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No. 7344

Vol 1823

United States Circuit Court of Appeals

For the Ninth Circuit.

WELLS FARGO BANK & UNION TRUST CO., a Corporation,

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States,
Northern District of California,
Southern Division.

No. 2758-K in Equity

THE REPUBLIC SUPPLY COMPANY OF CALIFORNIA, a corporation,

Complainant,

vs.

RICHFIELD OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

WILLIAM C. McDUFFIE, as ancillary receiver of Richfield Oil Company of California, a corporation,

Complainant,

vs.

WELLS FARGO BANK & UNION TRUST CO., a corporation,

Defendant.

ANCILLARY BILL OF COMPLAINT

By leave of court first had and obtained, William C. McDuffie, as ancillary receiver for Richfield Oil Company of California, a corporation, brings this his bill of complaint against Wells Fargo Bank & Union Trust Co., a corporation, and alleges as follows:

I.

That complainant, The Republic Supply Company of California, is a corporation duly organized

and existing under the laws of the State of California; that its office and principal place of business is in the City of Los Angeles, State of California, and that it is a citizen and resident of the State of California. [1*]

II.

That defendant, Richfield Oil Company of California, is a corporation duly organized and existing under the laws of the State of Delaware; that its office and principal place of business is in the City of Los Angeles, State of California, and that it is a citizen and resident of the State of Delaware.

III.

That defendant, Wells Fargo Bank & Union Trust Co., is a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is in the City and County of San Francisco, State of California, and that it is a citizen and resident of said State of California.

IV.

That on January 15, 1931, said The Republic Supply Company of California, a corporation, filed an action numbered S-125-J in the District Court of the United States in and for the Southern District of California, Central Division, against said Richfield Oil Company of California, a corporation. That said bill of complaint alleged that said complainant

*Page numbering appearing at the foot of page of original certified Transcript of Record.

was a California corporation and the said defendant was a Delaware corporation. That said bill of complaint further alleged that said defendant was indebted to said complainant in a sum in excess of $275,000 upon an unsecured open book account for goods, wares and merchandise sold and delivered by said complainant to said defendant. That said bill of complaint further alleged that certain other creditors were pressing said defendant for payment of their claims and threatening attachments, executions, seizures and forced sales of the property of said defendant, with the necessary consequence that said defendant would be compelled to cease its business and that its assets, if sacrificed, might not realize an amount sufficient to pay the creditors of said defendant in full. That said bill of complaint prayed that the rights of all creditors of said defendant be determined and that meanwhile a receiver be appointed of all of the property and assets of said defendant and continue to carry on the business conducted by said defendant, and that an injunction [2] issue against said defendant, its creditors, stockholders and all persons claiming or acting by, through or under them, to restrain them from interfering in any manner with said receiver or taking possession of the property and assets of said defendant and carrying on and conducting its business.

That said defendant formally appeared and filed its answer to said bill of complaint, admitting the

allegations of said bill and consenting to the relief demanded. That upon the same day that the action was commenced, said Court appointed William C. McDuffie as receiver for Richfield Oil Company of California, a corporation, with the powers and duties as to such receivership more fully set forth in the order appointing said receiver, which was duly signed by the Honorable William P. James, United States District Judge then presiding in said Court, at 9:40 A. M. on January 15, 1931, a copy of which order is hereunto annexed, marked Exhibit "A" and made a part hereof. That pursuant to said order, said William C. McDuffie, on said 15th day of January, 1931, duly qualified as such receiver and ever since has been and is now the duly appointed, qualified and acting receiver for said Richfield Oil Company of California, a corporation.

V.

That thereafter, and on said 15th day of January, 1931, in the action of The Republic Supply Company of California, a corporation, Complainant, v. Richfield Oil Company of California, a corporation, Defendant, duly filed in the District Court of the United States in and for the Northern District of California, Southern Division, No. 2758-K, said William C. McDuffie was appointed ancillary receiver by the Honorable Frank H. Kerrigan, United States District Judge in and for said Northern District of California, Southern Division, of all the property, assets and business of said defendant in the Northern District of California. That a copy of said order appointing said William C. McDuffie such

ancillary receiver is hereunto annexed, marked Exhibit "B" and made a part hereof. That pursuant to said order, and on the 20th day of January, 1931, said William C. McDuffie filed his oath of office with the Clerk of the United States District Court in said District and duly qualified as such ancillary receiver and ever since said time has been and is now the duly appointed, qualified and acting ancillary receiver of and for said [3] Richfield Oil Company of California, a corporation, within said Northern District of California.

VI.

That on or about the 12th day of July, 1930, said Richfield Oil Company of California, a corporation, by authorization of its Board of Directors, borrowed from said defendant, Wells Fargo Bank & Union Trust Co., a corporation, the sum of $625,000 and at that time made, executed and delivered to said Wells Fargo Bank & Union Trust Co., or order, its promissory note in the principal sum of $625,000, with interest thereon at the rate of six per cent (6%) per annum, payable ninety (90) days after date. That no agreement of any kind for collateral or as security for the repayment of said amount was executed then and there by said Richfield Oil Company of California, a corporation, to or for the benefit of said Wells Fargo Bank & Union Trust Co., a corporation.

VII.

That thereafter, and on or about the month of August, 1930, an agreement was entered into by

and between said Richfield Oil Company of California, a corporation, and said Wells Fargo Bank & Union Trust Co., a corporation, whereby said Richfield Oil Company of California, a corporation, agreed to deposit with said Wells Fargo Bank & Union Trust Co., a corporation, for collection, drafts drawn by said Richfield Oil Company of California on certain of its customers residing in foreign countries, which drafts were drawn for payment of certain shipments of commodities by said Richfield Oil Company of California, a corporation, to said customers. That it was then and there further agreed by and between said Richfield Company of California, a corporation, and said Wells Fargo Bank & Union Trust Co., a corporation, that said arrangement for the collection of said foreign drafts by said Wells Fargo Bank & Union Trust Co. was separate and distinct from any other financial transactions between said parties.

That pursuant to said agreement, said Richfield Oil Company of California, a corporation, thereafter deposited with said Wells Fargo Bank & Union Trust Co., a corporation, certain of its foreign drafts for collection, [4] among which were the following drafts deposited on or about October 8, 1930:

> Draft No. 103005, dated October 8, 1930, drawn by said Richfield Oil Company of California, a corporation, on Birla Brothers, Ltd., at Calcutta, India, in the sum of $63,950, payable at 180 days sight;

Draft No. 103006-B, dated October 8, 1930, drawn by said Richfield Oil Company of California, a corporation, on Birla Brothers, Ltd., at Calcutta, India, in the sum of $55,900.75, payable at 180 days sight.

That each of said drafts was thereafter duly accepted for payment by said drawee and thereafter became due and payable on May 14, 1931.

That in addition to the two drafts hereinabove set forth, said Richfield Oil Company of California, a corporation, thereafter deposited with said Wells Fargo Bank & Union Trust Co., a corporation, for collection, its draft drawn on Birla Brothers, Ltd., Calcutta, India, in the sum of $23,607.50, which said draft matures for payment on August 19, 1931.

VIII.

That thereafter, and during the months of October and November, 1930, said Richfield Oil Company of California, a corporation, borrowed from said Wells Fargo Bank & Union Trust Co., a corporation, the sums of approximately $155,000, the repayment of which was secured by all said foreign drafts and/or the proceeds thereof of Richfield Oil Company of California, a corporation, then deposited with said Wells Fargo Bank & Union Trust Co., a corporation, and all future foreign drafts and/or the proceeds thereof that might thereafter be placed by said Richfield Oil Company of California, a corporation, with said Wells Fargo Bank & Union Trust Co., a corporation, for collection.

That at the times said sums aggregating approximately $155,000 were so advanced by said Wells Fargo Bank & Union Trust Co., a corporation, it was again then and there agreed by said Bank with said Richfield Oil Company of California, a corporation, that these loans were and would be considered by said Bank and by said Richfield Oil Company of California, a corporation, entirely distinct and separate and apart from any and all other financial transactions between said parties.

That thereafter, and prior to the 15th day of January, 1931, the whole of said sums aggregating approximately $155,000 so borrowed by said Richfield [5] Oil Company of California, a corporation, from said Wells Fargo Bank & Union Trust Co., a corporation, on said drafts and secured thereby, was repaid to said Wells Fargo Bank & Union Trust Co., a corporation, by said Richfield Oil Company of California, a corporation, and said Bank now has no claim for said sum or any part thereof, or upon any of said drafts so deposited for collection or the proceeds thereof.

IX.

That after the appointment and qualification of said William C. McDuffie as receiver for said Richfield Oil Company of California, a corporation, as aforesaid, and on or about the 28th day of March, 1931, said Wells Fargo Bank & Union Trust Co., a corporation, filed with said receiver its proof of claim, which alleged that said

"Richfield Oil Company of California, a corporation, was on the 15th day of January, 1931, and at the time of the appointment of the Receiver herein and still is, justly and truly indebted to said claimant in the sum of Six Hundred Thirty-six Thousand One Hundred Eighty-nine and 95/100 Dollars ($636,189.95);

The basis of said debt is as follows:

Moneys loaned by claimant to said Richfield Oil Company of California at its special instance and request, evidenced by promissory note dated July 12, 1930, copy of which said promissory note is attached hereto marked Exhibit 'A' and made a part hereof;

Interest on said promissory note from November 30, 1930, to March 16, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

Moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for attorneys fees and preparation of indenture on behalf of creditor banks in the sum of $91.28, together with interest thereon from the 11th day of February, 1931, to the 16th day of March, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

Moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for legal expenses in the sum of $56.39, together with interest thereon

from the 4th day of March, 1931, to the 16th day of March, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

That there are no offsets or counterclaims to said debt; no notes or other evidences of indebtedness have been taken or received except those of which copies are hereto attached; no Judgment has been rendered for such indebtedness or any part thereof; and no claim to preference in payment from the receivership estate is made;

That no securities are held by said claimant for said indebtedness." [6]

That no note or other evidence of indebtedness, other than a copy of said note dated July 12, 1930 in the principal sum of $625,000, was attached to said proof of claim.

X.

That said two foreign drafts dated October 8, 1930, hereinabove set forth in paragraph VII hereof, became due and payable by said drawee on the 14th day of May, 1931, and at said time, said drawee, Birla Brothers, Ltd., paid to Nederlandsche Handel Maatschappij, at Calcutta, India, the correspondent bank of said Wells Fargo Bank & Union Trust Co., a corporation, the full amount of the proceeds of each of said drafts, amounting to the sum of $119,850.75, which said sum is now in the course of transmittal by mail from said Nederlandsche Handel Maatschappij to said Wells Fargo Bank & Union Trust Co., a corporation.

XI.

That said Wells Fargo Bank & Union Trust Co., a corporation, without right in law or equity, now claims a lien on each of said drafts and the proceeds thereof, and further claims the right and threatens to apply said proceeds, when received from its said correspondent bank, towards the payment of the unsecured indebtedness owing it from said Richfield Oil Company of California, a corporation, evidenced by said promissory note dated July 12, 1930 in the sum of $625,000, plus accrued interest.

XII.

That said Wells Fargo Bank & Union Trust Co., a corporation, without right in law or equity further claims a lien on the following drafts and the proceeds thereof:

Draft drawn by Richfield Oil Company of California, a corporation, on Ricardo Velasques in the sum of $1,219 maturing April 15, 1931;

Draft drawn by Richfield Oil Company of California, a corporation, on Bueno & Co. in the sum of $2,441, of which $1,500 matured on January 10, 1931;

Draft drawn by Richfield Oil Company of California, a corporation, on Sociedad Automaviliania Colombiana in the sum of $779.10, which matured January 25, 1931, but which maturity date was extended by said Richfield Oil Company of California to February 13, 1931; [7]

Draft drawn by Richfield Oil Company of California, a corporation, on Ito Bergonzali in the sum of $53.45, maturing January 15, 1931.

That said Wells Fargo Bank & Union Trust Co., a corporation, has already applied towards the payment of said unsecured indebtedness owing to it from said Richfield Oil Company of California, a corporation, evidenced by said promissory note dated July 12, 1930, part of the proceeds of said last mentioned drafts, and threatens to so apply the remainder of said proceeds, when received by it from its correspondent bank or banks.

XIII.

That pursuant to said order of the District Court of the United States in and for the Southern District of California, Central Division, hereto annexed and marked Exhibit "A", appointing said William C. McDuffie receiver for said Richfield Oil Company of California, a corporation, and pursuant to said order of the District Court of the United States in and for the Northern District of California, Southern Division, hereto annexed and marked Exhibit "B", appointing said William C. McDuffie ancillary receiver for said Richfield Oil Company of California, a corporation, said receiver was authorized forthwith to take and have complete exclusive control, possession and custody of all the property and assets owned by or under the control of or in the possession of said Richfield Oil Com-

pany of California, a corporation, real, personal and mixed, of every kind, character and description, within the Ninth Judicial District, and all persons, firms and corporations were forthwith ordered to deliver to said receiver all of said property and assets of said Richfield Oil Company of California, a corporation.

That payment by said Wells Fargo Bank & Union Trust Co., a corporation, to said William C. McDuffie, as receiver for said Richfield Oil Company of California, a corporation, of the proceeds of all of said drafts is imperative and essential for the continued operations of the business of said Richfield Oil Company of California, a corporation, by said receiver pursuant to the orders of said Courts; that said receiver is the true owner of the proceeds of said drafts, and said Wells Fargo Bank & Union Trust Co., a corporation, has no right, title or interest in or to the same or any part thereof. [8]

WHEREFORE, said William C. McDuffie, ancillary receiver and complainant herein, prays for relief as follows:

1. That said Wells Fargo Bank & Union Trust Co., a corporation, be ordered and directed to forthwith deliver to William C. McDuffie, ancillary receiver, complainant herein, the proceeds of each of the two foreign drafts set forth in paragraph VII hereof immediately upon their receipt by said Wells Fargo Bank & Union Trust Co., a corporation, from said Nederlandsche Handel Maatschappij, without any right of offset or claim thereupon.

2. That said Wells Fargo Bank & Union Trust Co., a corporation, be ordered and directed to forthwith pay over to said William C. McDuffie, ancillary receiver, complainant herein, the proceeds of said foreign draft in the sum of $23,607.50, deposited with it for collection by said Richfield Oil Company of California, a corporation, drawn on Birla Brothers, Ltd., at Calcutta, India, and maturing on August 19, 1931, immediately upon its receipt by said Wells Fargo Bank & Union Trust Co., a corporation, from said Nederlandsche Handel Maatschappij, and the proceeds of all other foreign drafts deposited with it for collection by said Richfield Oil Company of California, a corporation, without any right of offset or claim thereupon.

3. That temporarily and during the pendency of this suit, an injunction be issued against said Wells Fargo Bank & Union Trust Co., a corporation, and all of its officers, agents and employees, and all other persons claiming or acting by, through or under it, or any or all of them, to restrain them from disposing of any of said drafts or the proceeds thereof, and that said complainant may have such other and further relief in the premises as the needs of the case may require and as may be agreeable to equity.

4. That this Honorable Court give to complainant herein, as receiver, such further directions and instructions relating to the possession of all of said drafts and the proceeds thereof as may by the Court be deemed just and equitable.

5. That a writ of subpoena be granted to said complainant to be directed to said defendant, Wells Fargo Bank & Union Trust Co., a corporation, in this proceeding, requiring said defendant to be and appear before this [9] Honorable Court within the time required by law and the practice of this Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and, further, to perform and abide by such further order, direction and decree thereof as to this court shall seem meet.

GREGORY, HUNT & MELVIN,
Solicitors for Complainant,
William C. McDuffie, as ancillary receiver of Richfield Oil Company of California, a corporation.
[10]

State of California,
City and County of San Francisco.—ss.

Ward Sullivan, being first duly sworn, deposes and says:

That he is a member of the firm of Gregory, Hunt & Melvin, the solicitors for William C. McDuffie, ancillary receiver and complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true; that affiant makes this verification on behalf of said William C. McDuffie, ancillary receiver and complainant herein, for the reason that said William C. McDuffie is absent from

the City and County of San Francisco, where affiant has his offices.

WARD SULLIVAN.

Subscribed and sworn to before me this 23rd day of May, 1931.

[Seal] HALLIE L. LANFAR,

Notary Public in and for the City and County of San Francisco, State of California. [11]

EXHIBIT "A"

ORDER APPOINTING RECEIVER

This case came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. William C. McDuffie is hereby appointed receiver of all the property, assets and business owned by or under the control or in the possession of the defendant, Richfield Oil Company of California, real, personal and mixed, of whatsoever kind and description, within the jurisdiction of this court, including all lands, buildings, plants, warehouses, pipe lines, refineries, tanks, ships, shipping facilities, wharves, docks and dockage facilities, and appurtenances, owned, controlled, leased or operated by said defendant, and all raw

materials, materials in process of manufacture, finished materials, inventory, stock in trade, equipment, tools, machinery, furniture, supplies, merchandise and books of account, records, and other books, papers and accounts, cash on hand, in bank, or on deposit, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, bills and accounts receivable, and all rents, issues and profits and income accruing and to accrue from said assets, property and business, with authority to take possession of said assets and property and to continue said business as a going concern.

2. The defendant, its officers and employees, and any persons acting under its direction, shall deliver to the receiver any and all of the aforesaid properties, real, personal or mixed, in their possession or under their control.

3. All creditors, stockholders, and all persons claiming or acting by, through or under them, and all sheriffs and marshals and other officers, agents, attorneys, proctors, representatives, servants and employees, and all other persons, associations and corporations are hereby enjoined and restrained from instituting or prosecuting any action at law, or suit, or proceeding in equity or admiralty against the defendant, in any court of law or equity or admiralty, or before any association, organization or arbitration board, or arbitration by referee or umpire, or other court or tribunal, or otherwise, or from executing or issuing, or causing the execution or issuance, or the issuing out of any court of any

writ, process, summons, attachment, subpoena, replevin or other proceeding for the purpose of impounding or taking possession of or interfering with any of the aforesaid property owned by or in the possession or under the control of said defendant, or of the receiver, or owned by the defendant and in the possession of any of its officers, agents or employees, and all sheriffs, marshals and other officers and their deputies, representatives and servants, and all other persons, associations and corporations are hereby enjoined and restrained from removing, transferring, disposing of or attempting in any way to remove, transfer or dispose of, or in any way to interfere with any of the property, assets or effects in the possession of the defendant or of the receiver, and from doing any act or thing whatsoever to interfere with the possession and management by the receiver of the property and assets, or the business of the defendant, or in any way to interfere with the receiver in the discharge of any of his duties, or to interfere in any manner with the administration and disposition in this suit of the property and affairs of the defendant.

4. Said receiver is hereby authorized forwith to take and have complete exclusive control, possession and custody of all of the property and assets owned by or under the control of or in the possession of the defendant, real, personal and mixed of every kind, character and description within the Ninth Judicial Circuit, and all persons, firms and corporations, including the defendant, its officers,

agents and employees, shall forthwith deliver to the receiver all property and assets of the defendant, or in its possession, or under its control, and the defendant, its officers, agents and employees are hereby directed upon the request of the receiver to endorse, transfer, set over and deliver to the receiver any and all shares or certificates of stock, notes, bills of exchange or other documents, or muniments of title outstanding in the name of or in the possession or under the control of the defendant, or as to which the defendant has any interest, and to execute and deliver powers of attorney and proxies authorizing the receiver to vote on such shares of stock or certificates, and the receiver is hereby authorized to vote in person or by proxy any and all shares of stock standing in the name of the defendant.

5. The receiver is hereby authorized until the further order of this court to continue, manage and operate the busienss of the defendant, with full power and authority to carry on, manage and operate the business and properties of the defendant, and to buy and sell merchandise and supplies for cash or on credit as may be deemed advisable by said receiver, and to the extent that the receiver may determine that it is for the best interests of the receivership estate so to do, to perform and fulfill the contracts and obligations of the defendant, and to enter into new contracts incidental to the operation of its business, and to appoint and employ such managers, agents, employees, servants,

accountants, attorneys and counsel as may in the judgment of the receiver be advisable or necessary in the management, conduct, control or custody of the receivership estate, and the receiver is hereby authorized to make such payments and disbursements out of the property and assets of the defendant in his possession as may be needful or proper for the preservation and operation of the properties and business of the defendant, to issue such receivers' certificates for the purpose of meeting the obligations of said defendant as may be authorized from time to time by this court.

6. The receiver is hereby authorized to receive and collect rents, income and profits of any of the properties of the defendant, whether the same are now due or shall hereafter become due and payable, and to do such things, enter into such agreements, and employ such agents in connection with the management, care, preservation and operation of the properties of the defendant as the receiver may deem advisable, and to incur such expenses and make such disbursements as may in the judgment of the receiver be [12] necessary or advisable, including all bills and accrued charges for electric light and power, gas, water, insurance, freight and carriage charges on goods in transit, telephone charges, taxes and charges of the nature thereof, lawfully incurred or imposed upon the property prior to the receivership, and all claims for accrued wages, salaries and expenses of officers, agents and employees for services rendered prior to the date

of this order but remaining unpaid at the date hereof, to the end that the operation of the business of the defendant may not be interfered with or interrupted.

7. The receiver is hereby authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become a party to such suits, actions, proceedings at law, in equity or in admiralty, including ancillary proceedings in State or Federal Courts as may in the judgment of the receiver be necessary or proper for the protection, maintenance and preservation of the property and assets of the defendant and the conduct of its business, or the carrying out of the terms and provisions of this order, and likewise to defend, compromise and adjust, or otherwise dispose of, any and all suits, actions and proceedings instituted against him as receiver or against the defendant, and also to appear in and conduct the prosecution or defense of any action, suit or proceeding or to adjust or compromise any action, suit or proceeding now pending in any court by or against the defendant where such prosecution, defense or other disposition of such action, suit or proceeding will in the judgment of the receiver be advisable or proper for the protection of the property and assets of the defendant, and in his discretion to compound and settle with all debtors of the defendant, with persons having possession of its property or in any way responsible at law or in equity to the defendant upon such terms and in such manner as

the receiver shall deem just and beneficial to the defendant and its creditors.

8. The receiver is hereby given a period of six (6) months from the date hereof within which to arrive at a determination as to what contracts including leases of the defendant the receiver should affirm or disaffirm and within that time to make his election in that respect; the Court reserves the right if so advised from time to time to extend or diminish the time so granted to the receiver within which to make such election.

9. The receiver shall retain possession and continue to discharge the powers and duties aforesaid until the further order of this Court in the premises; but shall from time to time apply to this Court for such other and further orders and directions as he may deem necessary or advisable for the due administration of the receivership; and the receiver is hereby vested, in addition to the powers aforesaid, with all the general powers of receivers in cases of this kind, subject to the direction of this Court, and the receiver shall from time to time or when directed by the Court render to the Court reports of his proceedings and accountings with respect to all moneys received and disbursed by him or his agents.

10. The bond of the receiver in the sum of Three Million Five Hundred Thousand Dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which may come into his hands and abide and perform all things which he shall be di-

rected to do by this Court, with sufficient sureties to be approved by a Judge of this Court, shall be forthwith filed in the office of the Clerk of this Court.

11. A copy of this order shall, within ten (10) days from the date hereof, be published in two issues of the Los Angeles Daily Journal, a newspaper of general circulation, printed and published in the City of Los Angeles, State of California.

Dated: January 15, 1931.

WM. P. JAMES,
United States District Judge.

Filed Jan. 15, 1931. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk. [13]

EXHIBIT "B"

This cause came on to be heard at this term on motion of the Plaintiff for the appointment of an Ancillary Receiver of the property owned by or under the control of or in the possession of Defendant and located within the jurisdiction of this Court, and upon reading the verified bill of complaint and verified answer in this cause, the bill of complaint and answer filed by the Plaintiff and Defendant in the District Court of the United States for the Southern District of California, Central Division, and the order of the District Court of the United States for the Southern District of California, Central Division, thereunder, made January 15, 1931, appointing William C. McDuffie

receiver, and after hearing counsel and it appearing that said William C. McDuffie was appointed receiver upon the bill filed in and upon the order of said Court, of the properties belonging to, or under the control of, or in the possession of defendant, Richfield Oil Company of California, located within the jurisdiction of said Court, and that said Receiver has filed therein the bond required by said original order.

It is ORDERED, ADJUDGED AND DECREED that this Court take ancillary jurisdiction and that William C. McDuffie be, and he is hereby, appointed Ancillary Receiver of the Richfield Oil Company of California, a Delaware corporation, the defendant above named, in and for the United States Judicial District of the Northern District of California, Southern Division, with all rights, powers, privileges and authorities conferred upon him by the order of the District Court of the United States, for the Southern District of California, Central Division, appointing the said William C. McDuffie as Receiver, dated the 15th day of January, 1931, or by any subsequent order of said District Court of the United [14] States, for the Southern District of California, Central Division, whether heretofore or hereafter made, and that said William C. McDuffie is hereby authorized to perform any and all acts and take any and all steps in the jurisdiction of this Court which the said Receiver has been or may be hereafter authorized to take as Receiver in the jurisdiction of the District

Court of the United States, for the Southern District of California, Central Division.

It is further ORDERED, ADJUDGED AND DECREED that the said William C. McDuffie is authorized to act as Receiver herein without taking any further oath of office or executing any further bond.

It is further ORDERED, ADJUDGED AND DECREED that the defendant, its agents and employees, and all other persons, including creditors of the defendant, are hereby requested and commanded forthwith to deliver all property of every nature belonging to the defendant, or under its control, or in its possession, to the said Ancillary Receiver.

And it is further ORDERED, ADJUDGED AND DECREED that the said defendant and each and every of its agents and employees, and all creditors of the defendant, and all marshals, sheriffs, constables, and all deputies and servants, and all other officers, and, generally, all persons, firms and corporations whatsoever, are hereby enjoined from removing, transferring, disposing of, or attempting to remove, transfer or dispose of, or in any way interfere with any of the properties of the defendant, or from doing anything whatsoever of any nature to interfere with the possession and control of the said ancillary receiver of the property of said defendant.

And it is further ORDERED, ADJUDGED AND DECREED that all creditors, stockholders

and all persons claiming or acting by, through or under them, and all sheriffs and marshals and other officers, agents, attorneys, proctors, representatives, servants and employees, and all other persons, associations and corporations, are hereby enjoined and restrained from instituting or prosecuting any action at law or suit or proceeding in equity or admiralty against the said defendant in any court of law or equity or admiralty, or before any association, organization or arbitration board, or arbitration by referee or umpire or other court or tribunal, or otherwise, or from executing or issuing, or causing the execution or issuance, or the issuing out of any court of any writ, process [15] summons, attachment, subpoena, replevin or other proceeding, for the purpose of impounding or taking possession of or interfering with any property owned by or under the control of or in the possession of said defendant or of said Receiver; and all sheriffs, marshals and other officers and their deputies, representatives and servants, and all other persons, associations and corporations, are hereby enjoined and restrained from removing, transferring, disposing of or attempting in any way to remove, transfer, dispose of or in any way to interfere with any property, assets or effects in the possession of the defendant or of the Receiver, or owned by the defendant or under its control or in its possession or in the possession or control of any of its officers, agents or employees, and from doing any act or thing whatsoever to interfere with the possession

and management by the Receiver of the property and assets of the defendant, or in any way to interfere with the Receiver in the discharge of his duties, or in carrying on the business of said defendant, or to interfere in any manner with the administration and disposition in this suit of the property and affairs of the defendant.

It is further ORDERED, ADJUDGED AND DECREED that the said Ancillary Receiver shall have leave to apply to this Court for further orders and authority at any time hereafter as may be deemed by this Court proper and shall comply with all orders of the court of original jurisdiction.

It is further ORDERED, ADJUDGED AND DECREED that the said William C. McDuffie file in this court certified copies of all orders affecting the property of said defendant within this district made by the District Court of the United States, for the Southern District of California, Central Division, in said original cause for the information of the Court and all others interested.

Dated: January 15th, 1931.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed May 23, 1931. [16]

[Title of Court and Cause.]

ANSWER AND DEFENSES OF DEFENDANT WELLS FARGO BANK & UNION TRUST CO. TO ANCILLARY BILL OF COMPLAINT.

Comes now Wells Fargo Bank & Union Trust Co. defendant named in the ancillary bill of complaint of William C. McDuffie as ancillary receiver of Richfield Oil Company of California, a corporation, and answering said ancillary bill of complaint admits, denies and avers as follows, to-wit:

I.

Admits the allegations set forth in Paragraphs I, II and III, of said ancillary bill of complaint. [17]

II.

Admits the taking and existence of the proceedings for the appointment of William C. McDuffie as Receiver of the property and assets of Richfield Oil Company of California as a corporation set forth in Paragraph IV of said ancillary bill of complaint, but denies the jurisdiction of the Court to make the appointment of said Receiver and denies that said William C. McDuffie ever since the 15th day of January, 1931, or from any time subsequent or prior thereto has been and/or now is the duly or otherwise properly appointed and/or qualified and/or acting Receiver for said Richfield Oil Company of California, a corporation, or of the assets or property thereof.

III.

Admits the taking and existence of the proceedings for the appointment of William C. McDuffie as Receiver of the property and assets of Richfield Oil Company of California, a corporation as set forth in Paragraph V of said ancillary bill of complaint, but denies that since the 20th day of January, 1931, or any time subsequent or prior thereto, said William C. McDuffie has been and/or now is the duly or otherwise properly appointed and/or qualified and/or acting ancillary receiver of or for said Richfield Oil Company of California, a corporation, within said Northern District of California, or elsewhere, or of the assets or property thereof.

IV.

Admits the allegations set forth in Paragraph VI of said ancillary bill of complaint with respect to the borrowing by said defendant Richfield Oil Company of California, a corporation, from said defendant Wells Fargo Bank & Union Trust Co., of the sum of $625,000, and admits that no agreement for collateral or [18] security for the repayment of said amount was executed at said time by said Richfield Oil Company of California, a corporation, to or for the benefit of said Wells Fargo Bank & Union Trust Co., a corporation. but avers in this respect that subsequently, to-wit, in the months of October, November and December of 1930 and January of 1931, certain collateral security was deposited with said Wells Fargo Bank & Union Trust

Co. as more particularly hereinafter set forth, as security for certain indebtedness of said Richfield Oil Company of California, a corporation, including said indebtedness of $625,000 in said Paragraph VI of said ancillary bill of complaint referred to.

V.

Answering the allegations of Paragraph VII of said ancillary bill of complaint, said defendant denies that said agreement was as set forth in said Paragraph VII, and specifically denies that said agreement for the deposit of certain foreign drafts by Richfield Oil Company of California with said defendant, was only for the purpose of collection and/or was separate and/or distinct from any other financial transaction or transactions between said parties and denies that said foreign drafts were deposited only for collection and denies that each of said drafts No. 103005 and No. 103006-B were duly accepted for payment by the drawees thereof and admits that the same became due and payable on May 14, 1931, and admits that the draft last referred to in said Paragraph VII, in the sum of $23,607.50, matures for payment on August 19, 1931.

With respect to the agreement under which said drafts were deposited defendant avers that the only agreement between said Wells Fargo Bank & Union Trust Co. and said Richfield Oil Company of California, a corporation, with respect to the deposit [19] of said drafts and the collection and disposition of the proceeds thereof, was as set forth in two certain written contracts each designated "Ac-

ceptance Agreement", duly executed by said Richfield Oil Company of California, a corporation, and addressed to Wells Fargo Bank & Union Trust Co. prior to the receipt or acceptance of said drafts, said Acceptance Agreements being dated respectively October 4th and November 28th, 1930, and being for the establishment of credits in favor of Richfield Oil Company of California, a corporation, in the amounts respectively of $150,000 and $5000; that true copies of said Acceptance Agreements, being the sole contract between said Richfield Oil Company of California, a corporation and said Wells Fargo Bank & Union Trust Co. with respect to the deposit of said drafts, and the collection thereof and the disposition of the proceeds thereof, are hereto attached and expressly made a part hereof, said Acceptance Agreement dated October 4, 1930 being designated and marked Exhibit "A" and said Acceptance Agreement dated November 28, 1930, being designated and marked Exhibit "B".

VI.

Defendant admits that in the months of October and November, 1930, said Richfield Oil Company of California, a corporation, borrowed from said Wells Fargo Bank & Union Trust Co. the sum of approximately $155,000, repayment of which was secured by certain foreign drafts and the proceeds thereof, then or thereafter deposited with said Wells Fargo Bank & Union Trust Co. by said Richfield Oil Company of California, a corporation, and in

this respect defendant avers that $150,000 of said sum was borrowed pursuant to Acceptance Agreement Exhibit "A" and $5000 was borrowed pursuant to Acceptance Agreement Exhibit "B" and that the drafts deposited by said Richfield Oil Company of [20] California, a corporation, with said Wells Fargo Bank & Union Trust Co. were to be held and collected and the proceeds thereof held and disposed of, pursuant to the terms, conditions and covenants of said Acceptance Agreements and, as therein set forth, as security for the amount borrowed under said Acceptance Agreements and likewise as security for any other liability of said Richfield Oil Company of California, a corporation, to said Wells Fargo Bank & Union Trust Co., whether existing at the time of the execution of said Agreements respectively or at the time of the deposit of said drafts respectively, or thereafter contracted or owing.

Defendant denies that at the time said sums aggregating approximately $155,000 or any part thereof were advanced by said Wells Fargo Bank & Union Trust Co., or at any time, it was again, or at all, then or there, or at any time, agreed by said Wells Fargo Bank & Union Trust Co. with said Richfield Oil Company of California, or with any person or party in behalf of said Richfield Oil Company of California, that said loans or any thereof were and/or would be considered by said Wells Fargo Bank & Union Trust Co. and/or by said Richfield Oil Company of California as entirely or

at all distinct and/or separate and/or apart from any and/or other financial or other transaction or transactions between said parties.

Defendant admits that said sum aggregating approximately $155,000 borrowed from said Wells Fargo Bank & Union Trust Co. by said Richfield Oil Company of California, pursuant to said Acceptance Agreements, was repaid, but denies that said defendant Wells Fargo Bank & Union Trust Co. now has no claim upon or to any of said drafts deposited pursuant to said Acceptance Agreements, or to the proceeds, or any thereof, of said drafts [21] and in this respect defendant avers that pursuant to the express terms of said Agreements Exhibits "A" and "B" and likewise pursuant to the provisions of the laws of the State of California with respect to a banker's lien, defendant has a lien and claim upon said drafts and all thereof and/or the proceeds collected upon said drafts and to be hereafter collected upon said drafts, as security for any and all unpaid indebtedness from said Richfield Oil Company of California, a corporation, to said Wells Fargo Bank & Union Trust Co.

VII.

With respect to the allegations set forth in Paragraph IX of said ancillary bill of complaint, defendant admits that defendant, Wells Fargo Bank & Union Trust Co., filed, on or about the 28th day of March, 1931, its Proof of Claim with said William C. McDuffie as Receiver for said Richfield Oil

Company of California, a corporation, averring in this respect, however, that said claim was filed without consenting to the jurisdiction of said William C. McDuffie as said purported receiver for said Richfield Oil Company of California, a corporation, and without waiving the rights of said Wells Fargo Bank & Union Trust Co. to attack the jurisdiction of said Receiver to require the filing of claims or to act upon or decide the same, or to liquidate or continue the business of said Richfield Oil Company of California, a corporation, or to retain and dispose of the assets and properties thereof.

Defendant admits that said claim embodied the language purportedly quoted therefrom in Paragraph IX of said ancillary bill of complaint and further admits that no note or other evidence of indebtedness, other than a copy of said note dated July 12, 1931, in the principal sum of $625,000, was attached to said Proof [22] of Claim. Further in this respect said defendant avers that at the time of the preparation of said Claim the information therefor was compiled and delivered to said defendant by its Note Department; that said Note Department was then and now is a separate Department of said Wells Fargo Bank & Union Trust Co.; that the Foreign Department of said Wells Fargo Bank & Union Trust Co. was likewise then and now is a separate Department of said Wells Fargo Bank & Union Trust Co.; that said Note Department, at the time of filing said Claim, kept and still does

keep, records of loans from and indebtedness to said Wells Fargo Bank & Union Trust Co. evidenced by promissory notes, and had not at that time and has now, no records in its Department of collateral or other security deposited with said Foreign Department or with any of the other separate Departments of said Wells Fargo Bank & Union Trust Co.; that therefore, through inadvertence and lack of knowledge, by said Note Department, said claim stated that there were no offsets or counterclaims to the indebtedness set forth in said claim, and no claim to preference in payment and further stated that no securities were held by said Wells Fargo Bank & Union Trust Co. for said indebtedness, whereas at said time the truth and the facts were and now are, that there were and now are certain collateral securities in the possession of Wells Fargo Bank & Union Trust Co., and particularly of its said Foreign Department, as security for all of the said indebtedness of said Richfield Oil Company of California, a corporation, to said Wells Fargo Bank & Union Trust Co., being more particularly, the drafts and/or proceeds thereof, referred to in said ancillary bill of complaint and more specifically hereinafter referred to.

That prior to the filing of said Claim, to-wit: on or about the 16th day of January, 1931, in response to a [23] telegraphic request from said William C. McDuffie to said Wells Fargo Bank & Union Trust Co. requesting the restoration of said cash balances

upon which said Wells Fargo Bank & Union Trust Co. had prior thereto exercised its banker's lien, said Wells Fargo Bank & Union Trust Co. duly informed said Receiver by telegram and otherwise that it would restore and did restore to said William C. McDuffie as Receiver, the balance in the checking account at Wells Fargo Bank & Union Trust Co. of said Richfield Oil Company of California, expressly stating, however, that said Wells Fargo Bank & Union Trust Co. was holding certain collections, to-wit: said drafts, as security for acceptances and advising said Receiver that said Wells Fargo Bank & Union Trust Co. continued to reserve all of its rights under said agreements, and/or its banker's lien against said collections as security for all indebtedness of said Richfield Oil Company of California to said Wells Fargo Bank & Union Trust Co. Said information was transmitted to said Receiver on or about the 16th day of January, 1931, and at all times subsequent thereto said Wells Fargo Bank & Union Trust Co. has maintained and so advised said Receiver, that it claimed said drafts and/or the proceeds thereof, as security for the indebtedness of said Richfield Oil Company of California, to it, except only that at the request of said Receiver said Wells Fargo Bank & Union Trust Co. subsequently remitted the sum of $1956.52 on account of partial collection received upon a certain draft known as the Bueno & Co. draft hereinafter more specifically referred to.

Upon the discovery of the inadvertence of its Note Department with respect to the preparation of said claim hereinbefore referred to, said Wells Fargo Bank & Union Trust Co. forthwith, to-wit: on or about the 19th day of May, 1931, prepared a [24] written amendment to claim, a true copy of which Amendment to Claim is attached hereto and marked Exhibit "C" and by reference made a part hereof; there was attached to and made a part of said Amendment to Claim as Exhibits "A", "B" and "C" thereof respectively, a true copy of the Proof of Claim of Wells Fargo Bank & Union Trust Co. hereinbefore referred to and true copies of said Acceptance Agreements Exhibits "A" and "B" to this Answer; said Amendment to Claim, including said exhibits thereto, was duly presented to said William C. McDuffie, as Receiver of said Richfield Oil Company of California, on May 20, 1931, but said William C. McDuffie refused to accept the same. Thereupon, forthwith, said Wells Fargo Bank & Union Trust Co. prepared and filed in the District Court of the United States in and for the Southern District of California, Central Division, in the proceedings in which said receivership of said Richfield Oil Company of California was pending, its verified Petition for an order to show cause why the Receiver should not be compelled to receive said Amendment to Claim. Subsequently, after negotiations between the Attorneys for said Wells Fargo Bank & Union Trust Co. and the Attorneys for said Receiver, it was stipulated that

said Amendment to Claim, including the exhibits thereto, should be filed, without prejudice to the Receiver's right to subsequently reject the same, or to make any objections to its contents, and the time and manner of filing thereof, and thereafter, on to-wit: the 29th day of May, 1931, it was duly and regularly ordered by the Honorable William P. James, United States District Judge for the United States District Court, Southern District of California, Central Division, in the proceedings there pending, that said Wells Fargo Bank & Union Trust Co. be authorized to file its Amendment to Proof of Claim, including the exhibits thereto, and that said William C. McDuffie as Receiver [25] be instructed to receive and accept the same for filing. A true copy of said order is attached hereto, marked Exhibit "D" and by express reference made a part hereof.

VIII.

With respect to the allegations set forth in Paragraph X of said ancillary bill of complaint said defendant admits that said drafts dated October 8, 1930, and referred to more specifically in Paragraph VII of said ancillary bill of complaint, became due and payable by the drawee thereof on the 14th day of May, 1931, and admits that said drafts were at said time by the drawee thereof paid to Nederlandsche Handel Maatschappij, at Calcutta, India, but in this respect avers that payment thereof to defendant Wells Fargo Bank & Union Trust Co. was not made until the 10th day of June, 1931, at

which time the net proceeds of said drafts, to-wit: the sum of $119,512.54, were received in San Francisco, California, by defendant Wells Fargo Bank & Union Trust Co. and applied against the outstanding indebtedness of said Richfield Oil Company of California to it.

IX.

Answering the allegations of Paragraph XI of said ancillary bill of complaint said defendant admits that it claims a lien upon each of said drafts referred to in Paragraph VII of said ancillary bill of complaint but denies that said claim is without right in law or in equity and admits that it claims a lien upon said drafts and the proceeds thereof and the right to apply the proceeds thereof as and when received by it from its correspondent bank, toward the payment of the unsecured indebtedness owing to it from said Richfield Oil Company of California, as evidenced by said promissory note dated July 12, 1930, in the sum of $625,000, plus accruing interest, and in this respect said defendant avers that said drafts and each of them, and the [26] proceeds thereof, were received by it pursuant to said Acceptance Agreements Exhibits "A" and "B", and under the provisions of the laws of the State of California with reference to banker's liens, as security not alone for the sum of $155,000 advanced pursuant to said Acceptance Agreements, but as security for any and all indebtedness of said

Richfield Oil Company of California to said defendant bank, whether existing at the time of the deposit of said drafts or the execution of said Agreements or at any time thereafter existing.

X.

Answering the allegations of Paragraph XII of said ancillary bill of complaint said defendant admits that it claims a lien upon the drafts set forth in said Paragraph XII and the proceeds thereof, but denies that said claim to a lien is without right in law or in equity and in this respect defendant avers as follows:

With respect to the second draft referred to in said Paragraph XII of said ancillary bill of complaint, to-wit: the draft drawn by Richfield Oil Company of California, a corporation, on Bueno & Co., in the sum of $2,441.00, defendant avers that at the request of William C. McDuffie as Receiver of Richfield Oil Company of California, a corporation, it transmitted to him the sum of $1956.54 on account of the proceeds of said draft received by it, with the express understanding and agreement however, that the transmittal of said proceeds was for the convenience of said William C. McDuffie and without waiver of any of the rights of said defendant Wells Fargo Bank & Union Trust Co., pursuant to said Acceptance Agreements and/or under its banker's lien, with respect to the balance of said draft, or of any other of said drafts, or the proceeds thereof.

Further answering the allegations of Paragraph XII of said ancillary bill of complaint, said defendant admits that it has already applied toward the payment of said indebtedness [27] owing it from said Richfield Oil Company of California, evidenced by said promissory note dated July 12, 1930, denying however, that said indebtedness was unsecured, part of the proceeds of said last mentioned drafts and intends, unless precluded by the order of this Court, to apply the remainder of the proceeds of said drafts as and when received by it upon the collection thereof, to the payment of said indebtedness. In this respect defendant avers that it has received and applied the proceeds of said drafts and of the drafts mentioned in Paragraph VII of said ancillary bill of complaint, pursuant to the terms, conditions and covenants of said Acceptance Agreements Exhibits "A" and "B", and pursuant to its banker's lien, in the following amounts and as follows:

Drawee	Amount	Date Paid	Amount Received
Bueno & Co.	$2441.00	May 11, 1391 (Bal)	$ 469.06
Ricardo Velasques	1219.00	May 19, 1931	1245.11
Birla Bros. (Drafts Nos. 103005 and 103006-B)	119,850.75	June 10, 1931	119,512.54
Total amount received and credited against said indebtedness of Richfield Oil Co. of California hereinbefore referred to			$121,226.71

XI.

Answering the allegations of Paragraph XIII of said ancillary bill of complaint, said defendant denies that said Receiver was at any time authorized forthwith or at any time to take and/or have complete, exclusive or any control or possession or custody of all or any of the property and/or assets owned by or under the control of or in the possession of said Richfield Oil Company of California, a corporation, real, personal or mixed, or of any kind or character or description, within the Ninth Judicial District or elsewhere, and denies that all persons and/or firms and/or corporations were ever validly or properly, or with [28] due or any proper authorization, forthwith or at any time, ordered to deliver to said Receiver all or any of the property or assets of said Richfield Oil Company of California, a corporation, and in that respect defendant expressly avers that said District Court in and for the Southern District of California, Central Division, was without jurisdiction or authority to make said order marked Exhibit "A" to complainant's ancillary bill of complaint, or any valid or proper order appointing said William C. McDuffie or any other person Receiver for said Richfield Oil Company of California, a corporation, and denies that said District Court of the United States in and for the Northern District of California, Southern Division, had jurisdiction or authority to make said order marked Exhibit "B" to complainant's ancillary bill of complaint, or any valid or proper order appointing

said William C. McDuffie or any other person ancillary receiver for said Richfield Oil Company of California, a corporation.

Further answering the allegations of Paragraph XIII of said ancillary bill of complaint, defendant denies that the payment by said defendant Wells Fargo Bank & Union Trust Co. to said William C. McDuffie as Receiver for said Richfield Oil Company of California, a corporation, or otherwise, of the proceeds or any thereof, of all or any of said drafts, is imperative or essential for the continued or other operations of the business of said Richfield Oil Company of California by said Receiver pursuant to the order or orders of said Court or Courts, or pursuant to any order or any authority, and in this respect defendant further avers that said Receiver has no authority or jurisdiction to continue the business of said corporation.

Defendant denies that the Receiver is the true owner or the owner, or has any claim to the proceeds of said drafts or any thereof or to said drafts and denies that said Wells Fargo Bank [29] & Union Trust Co. has no right or title or interest in or to the same or any thereof or any part thereof and in this respect defendant expressly avers that upon the deposit of said drafts by it pursuant to said two Acceptance Agreements Exhibits "A" and "B" said Wells Fargo Bank & Union Trust Co. held said drafts and each thereof and the proceeds thereof, as security for any and all indebtedness of said Richfield Oil Company of California, a cor-

poration, to it, including said indebtedness evidenced by said promissory note dated July 12, 1930 in the amount of $625,000 with accruing interest thereon, and that irrespective of said Agreements Exhibits "A" and "B", said defendant held said drafts and/or the proceeds thereof at all times subsequent to the maturity of said indebtedness of said Richfield Oil Company of California, a corporation, to said Wells Fargo Bank & Union Trust Co., to-wit: the 10th day of September, 1930, pursuant to the banker's lien of said defendant as created by the laws and statutes of the State of California with the right to apply said drafts and/or the proceeds thereof against said matured indebtedness and that upon the collection of said drafts said defendant, Wells Fargo Bank & Union Trust Co., had and has the right, pursuant to said Agreements and pursuant to its said banker's lien, to apply the proceeds thereof on account of the matured and unpaid indebtedness of said Richfield Oil Company of California, a corporation, to it.

And for a FURTHER, SEPARATE AND SECOND DEFENSE to said ancillary bill of complaint, said defendant Wells Fargo Bank & Union Trust Co., admits, denies and avers as follows, to-wit:

I.

Said defendant avers that the above entitled Court is without jurisdiction to determine the ques-

tion herein presented [30] as to the ownership of the drafts referred to in said bill of complaint and/or the proceeds thereof.

II.

Said defendant avers that the Order of the District Court of the United States for the Southern District of California, Central Division, purportedly appointing said William C. McDuffie as Receiver of said Richfield Oil Company of California, a corporation, and/or of the assets and properties thereof, was improper and unauthorized and made without proper jurisdiction of said Court in said proceedings and furthermore, that the Order of the District Court of the United States for the Northern District of California, Southern Division, purportedly appointing said William C. McDuffie as ancillary Receiver of said Richfield Oil Company of California, a corporation, and/or of the assets and properties thereof, was improper and unauthorized and made without proper jurisdiction of said Court in said proceedings.

III.

Said defendant avers further that said Receiver has no right or authority, nor any jurisdiction to liquidate the affairs of said Richfield Oil Company of California, a corporation, or to continue the business of said corporation, nor has said Receiver any right or authority to fix the time for the presentation of claims against said Richfield Oil Company of California, a corporation, or to pass upon the validity of said claims, or to pay the same, or

to preclude the filing of said claims or of amendments to claims, and specifically that said Receiver had and has no jurisdiction to require said Wells Fargo Bank & Union Trust Co. to file its said claim in said receivership proceedings, or to deny to said Wells Fargo Bank & Union Trust Co. the right to file an amendment to said claim or to deny to said Wells Fargo Bank & [31] Union Trust Co. its right to claim said drafts and/or the proceeds thereof as security for said indebtedness of said Richfield Oil Company of California, a corporation, to defendant Wells Fargo Bank & Union Trust Co. on account of the alleged delay in presenting the claim thereto or on account of the alleged waiver by the filing of said defendant's claim against said Richfield Oil Company of California, a corporation, or for any reason.

In this respect defendant further avers that any order of the above entitled Court or of the United States District Court for the Northern District of California, Southern Division, purporting to give to said Receiver, or to said ancillary Receiver, the right to fix a time for the presentation of claims, and/or the right to pass upon and/or reject said claims, and/or to determine the validity or invalidity thereof and/or to determine what security if any said defendant or other claimants may or might have as securing the indebtedness of said Richfield Oil Company of California, a corporation, to it or them, was and is without jurisdiction and made and given in excess of and without the jurisdiction of said Courts or either thereof.

WHEREFORE, said defendant, Wells Fargo Bank & Union Trust Co., prays:

I.

That complainant take nothing by his said ancillary bill of complaint.

II.

That the relief sought by complainant in his said ancillary bill of complaint be denied.

III.

That said Wells Fargo Bank & Union Trust Co. be authorized and permitted to retain said drafts and/or the proceeds [32] thereof and to apply the same against the indebtedness of said Richfield Oil Company of California, a corporation, to it, or that said complainant be found to be without any right, title or interest in or claim to said drafts and/or the proceeds thereof, and that said Wells Fargo Bank & Union Trust Co. be found to be the owner of said drafts and/or the proceeds thereof, for the purpose of securing the indebtedness of said Richfield Oil Company of California, a corporation, to it, and for the purpose of applying the proceeds of said drafts, as and when received by it, against the unpaid and matured indebtedness of said Richfield Oil Company of California, a corporation, to it.

IV.

That said defendant Wells Fargo Bank & Union Trust Co. recover from said complainant its costs of suit herein incurred.

V.

That defendant Wells Fargo Bank & Union Trust Co. have such other and further relief as to this court shall seem meet.

HELLER, EHRMAN, WHITE AND McAULIFFE,

Solicitors for Defendant, Wells Fargo Bank & Union Trust Co. [33]

State of California,
City and County of San Francisco—ss.

Julian Eisenbach being duly sworn, desposes and says: That he is an officer, to-wit: Vice-President of Wells Fargo Bank & Union Trust Co., a corporation, and as such is authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief and as to those matters he believes the same to be true

JULIAN EISENBACH.

Subscribed and sworn to before me this 24th day of July, 1931.

(Seal) JENNIE DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Feb. 29, 1932. [34]

EXHIBIT "A"

ACCEPTANCE AGREEMENT

(Arising out of importation or exportation of goods)

To WELLS FARGO BANK & UNION TRUST CO., SAN FRANCISCO.

Dear Sirs:

We hand you herewith, for acceptance, the following drafts:

Number	Date	Covering following		Amount
	Oct. 6	Merchandise		$150,000
	Marks	Numbers	Description	

Payable in San Francisco to the order of Ourselves

It is agreed that the proceeds of the above will be used for financing the actual goods under consideration, and the proceeds of the sale of the goods shall be applied to liquidate the acceptance.

In consideration of your acceptance of the said draft or drafts the undersigned, jointly and severally, agree to pay you at the time of the acceptance a commission of ..... per cent, and further agree to pay you the amount of the said draft or drafts at your office one day before maturity. We waive all liability on your part in case the goods are not according to contract, either in description, quality, or quantity, or in any other

respect. All bills of lading, warehouse receipts and other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted and bind ourselves to furnish you prior to ..... with shipping documents covering this merchandise or with exchange arising out of the transaction being financed by the credit.

We further agree to give and furnish you on demand additional security or to make payment on account in amounts and character satisfactory to you. If we fail to comply with any such demand or in case of our insolvency, assignment, bankruptcy, or failure in business, all our obligations and liabilities direct or indirect to you whether arising hereunder or otherwise shall forthwith become due and payable without demand or notice. All goods represented by bills of lading, warehouse receipts or other documents of title, pledged with you as security for your acceptances hereunder, shall be at all times covered by us by certificates of insurance under open policies to your order or by specific policies payable to you as your interest may appear, to an amount sufficient to cover your advances or obligations hereunder, and you are to have specific claim and lien on such policies and their proceeds to the amount of your interest in the goods thereby insured. [35]

The undersigned hereby consents to any renewal and extension of time of payment of any draft, drafts or other indebtedness that may be granted by you, and do also consent that the securities set forth in said acceptance agreement may be exchanged or surrendered from time to time without notice to or further assent from the undersigned, and that the undersigned will remain bound by this guarantee, notwithstanding such changes, guarantees, renewals and extensions.

Upon our failure to comply with any of the terms hereof or upon the non-payment by us of this or any other liability to you when due or at any other time or times thereafter then in such case all obligations and liabilities direct and contingent from us to you whether arising hereunder or otherwise shall at your election forthwith become due and payable without demand or notice and we hereby give to you full power and authority to sell, assign, transfer and deliver the whole or any part of the securities, bills of lading or documents of title or the goods represented thereby or of any securities substituted therefor or added thereto at any broker's board or at any public or private sale with or without notice or advertisement at your option and do further agree that you may become a purchaser at such sale if at any broker's board or at public auction and hold the property or security so purchased as your own property absolutely free from any claim of or in the right of ourselves. In

case of any sale or other disposition of the whole or any part of the security or property aforesaid, you may apply the proceeds of such sale or disposition to the payment of all legal or other costs and expenses of collection, sale and delivery and of all expenses incurred in protecting the security or other property or the value thereof, as hereinafter provided and may apply the residue of such proceeds to the payment of this or of any then existing liability of ours to you whether then payable or not, returning the overplus to us and in case of any deficiency we agree to pay to you the amount thereof forthwith with legal interest. You may also upon any such non-payment apply the balances of all our deposit accounts in the same way that you are authorized to apply the proceeds of any sale of the security or property hereunder.

You may pay taxes, charges, assessments, liens or insurance premiums upon the security or any part of it, or otherwise protect the value thereof or of the property represented thereby, and may charge against us all expenditures so incurred; but you shall be under no duty or liability with respect to the protection or collection of any security held hereunder or of any income thereon, nor with respect to the protection of preservation of any rights pertaining thereto, beyond the safe custody of such security. We hereby agree that if, in your opinion, the market value of the security hereby or hereafter pledged to secure this obligation, after de-

ducting all charges against the same is at any time less than the amount thereof and ..... per centum thereof added thereto we will upon demand, deposit satisfactory additional security so that the market value of the security pledged hereunder, after deducting all charges, shall always equal the amount of this obligation plus such additional percentage.

We hereby agree to indemnify you against any liability or responsibility for the correctness, validity, or genuineness of any documents or any signatures or endorsements thereon representing goods which you hold, purchase or sell under this engagement, or for the description, quantity, quality or value of the property declared therein, or of any insurance certificates or policies, and against any general loss or charges or other expenses incurred accruing with respect to such goods through delay in transmission of shipping documents or through any other cause, which charges and other expenses we agree to pay. We further agree that no delay on [36] your part in exercising any right hereunder shall operate as a waiver of such rights or of any right under this obligation.

RICHFIELD OIL COMPANY
OF CALIFORNIA,

(Seal) By R. W. McKEE,
By W. E. HART,
Treasurer.

Dated: October 4, 1930. [37]

EXHIBIT "B"

ACCEPTANCE AGREEMENT

(Arising out of importation or exportation of goods)

To WELLS FARGO BANK & UNION TRUST CO., SAN FRANCISCO.

Dear Sirs:

We hand you herewith, for acceptance, the following drafts:

Number	Date	Covering following	Amount
	Nov. 24	Merchandise	$5000.00
	Marks	Numbers Description	

Payable in San Francisco to the order of Ourselves

It is agreed that the proceeds of the above will be used for financing the actual goods under consideration, and the proceeds of the sale of the goods shall be applied to liquidate the acceptance.

In consideration of your acceptance of the said draft or drafts the undersigned, jointly and severally, agree to pay you at the time of the acceptance a commission of ..... per cent, and further agree to pay you the amount of the said draft or drafts at your office one day before maturity. We waive all liability on your part in case the goods are not according to contract, either in description, quality, or quantity, or in any other respect. All bills of lading, warehouse receipts and

other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted and bind ourselves to furnish you prior to ..... with shipping documents covering this merchandise or with exchange arising out of the transaction being financed by the credit.

We further agree to give and furnish you on demand additional security or to make payment on account in amounts and character satisfactory to you. If we fail to comply with any such demand or in case of our insolvency, assignment, bankruptcy, or failure in business, all our obligations and liabilities direct or indirect to you whether arising hereunder or otherwise shall forthwith become due and payable without demand or notice. All goods represented by bills of lading, warehouse receipts or other documents of title, pledged with you as security for your acceptances hereunder, shall be at all times covered by us by certificates of insurance under open policies to your order or by specific policies payable to you as your interest may appear, to an amount sufficient to cover your advances or obligations hereunder, and you are to have specific claim and lien on such policies and their proceeds to the amount of your interest in the goods thereby insured. [38]

The undersigned hereby consents to any renewal

and extension of time of payment of any draft, drafts or other indebtedness that may be granted by you, and do also consent that the securities set forth in said acceptance agreement may be exchanged or surrendered from time to time without notice to or further assent from the undersigned, and that the undersigned will remain bound by this guarantee, notwithstanding such changes, guarantees, renewals and extensions.

Upon our failure to comply with any of the terms hereof or upon the non-payment by us of this or any other liability to you when due or at any other time or times thereafter then in such case all obligations and liabilities direct and contingent from us to you whether arising hereunder or otherwise shall at your election forthwith become due and payable without demand or notice and we hereby give to you full power and authority to sell, assign, transfer and deliver the whole or any part of the securities, bills of lading or documents of title or the goods represented thereby or of any securities substituted therefor or added thereto at any broker's board or at any public or private sale with or without notice or advertisement at your option and do further agree that you may become a purchaser at such sale if at any broker's board or at public auction and hold the property or security so purchased as your own property absolutely free from any claim of or in the right of ourselves. In case of any sale or other disposition of the whole

or any part of the security or property aforesaid, you may apply the proceeds of such sale or disposition to the payment of all legal or other costs and expenses of collection, sale and delivery and of all expenses incurred in protecting the security or other property or the value thereof, as hereinafter provided and may apply the residue of such proceeds to the payment of this or of any then existing liability of ours to you whether then payable or not, returning the overplus to us and in case of any deficiency we agree to pay to you the amount thereof forthwith with legal interest. You may also upon any such non-payment apply the balances of all our deposit accounts in the same way that you are authorized to apply the proceeds of any sale of the security or property hereunder.

You may pay taxes, charges, assessments, liens or insurance premiums upon the security or any part of it, or otherwise protect the value thereof or of the property represented thereby, and may charge against us all expenditures so incurred; but you shall be under no duty or liability with respect to the protection or collection of any security held hereunder or of any income thereon, nor with respect to the protection of preservation of any rights pertaining thereto, beyond the safe custody of such security. We hereby agree that if, in your opinion, the market value of the security hereby or hereafter pledged to secure this obligation, after deducting all charges against the same is at any time

less than the amount thereof and ..... per centum thereof added thereto we will upon demand, deposit satisfactory additional security so that the market value of the security pledged hereunder, after deducting all charges, shall always equal the amount of this obligation plus such additional percentage.

We hereby agree to indemnify you against any liability or responsibility for the correctness, validity, or genuineness of any documents or any signatures or endorsements thereon representing goods which you hold, purchase or sell under this engagement, or for the description, quantity, quality or value of the property declared therein, or of any insurance certificates or policies, and against any general loss or charges or other expenses incurred accruing with respect to such goods through delay in transmission of shipping documents or through any other cause, which charges and other expenses we agree to pay. We further agree that no delay on [39] your part in exercising any right hereunder shall operate as a waiver of such rights or of any right under this obligation.

RICHFIELD OIL COMPANY
OF CALIFORNIA,

(Seal) By J. F. WALLACE,
By B. B. WILSON.
Treasurer.

Dated: November 25, 1930. [40]

EXHIBIT "C"

AMENDMENT TO PROOF OF CLAIM.

State of California,
City and County of San Francisco—ss.

On the 19th day of May, 1931, came F. I. Raymond, of and in said State and City and County, and made oath and says he is authorized to make this proof.

That affiant is Vice-President and Cashier of Wells Fargo Bank & Union Trust Co., a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, claimant herein, and verified this amendment to proof of claim for the following reasons;

That claimant has no Treasurer and that of all its officers the duties of affiant correspond most nearly to those of Treasurer;

That as set forth in the verified claim of claimant filed with the Receiver herein on the 30th day of March, 1931, a copy of which claim is hereunto annexed, marked Exhibit "A" [41] and made a part hereof, Richfield Oil Company of California, a corporation was, on the 15th day of January, 1931, and at the time of the appointment of the Receiver herein, and still is, justly and truly indebted to said claimant in the sum of $636,189.95;

That the basis of said indebtedness is for moneys loaned by claimant to said Richfield Oil Company

of California at its special instance and request, evidenced by a promissory note dated July 12, 1930, a copy of which said promissory note is attached to said verified claim hereinbefore referred to, as Exhibit "A" thereof, together with interest thereon from November 30, 1930, at the rate of six per cent per annum and accruing interest, and also for certain moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for and in behalf of said Richfield Oil Company of California, all as more particularly set forth in said verified claim, Exhibit "A", to which reference is hereby made for the particulars of said claim;

That at the time of the preparation of said claim the information therefor was compiled and delivered to affiant by the Note Department of said claimant, Wells Fargo Bank & Union Trust Co.; said Note Department was then and now is, a separate Department of said Wells Fargo Bank & Union Trust Co.; the Foreign Department likewise was then and now is a separate Department of said Claimant, Wells Fargo Bank & Union Trust Co.; said Note Department at that time kept and does still keep records of loans from and indebtedness to said Wells Fargo Bank & Union Trust Co., evidenced by promissory notes, and had not at that time and has now no records in its Department of collateral or other security deposited with said Foreign Department or with [42] any of the other separate

Departments of said Wells Fargo Bank & Union Trust Co.;

That therefore, through inadvertence and lack of knowledge by said Note Department said claim, Exhibit "A", stated that there were no offsets or counterclaims to the debt set forth in said claim and no claim to preference in payment from the receivership estate was made, and further stated that no securities were held by said claimant for said indebtedness whereas at said time the truth and the facts were and now are, that unknown to said Note Department there were and now are certain collateral securities in the possession of said Foreign Department as security for all of the said indebtedness of said Richfield Oil Company of California to said Wells Fargo Bank & Union Trust Co., claimant herein, more particularly as follows, to-wit:

> On or about the 14th day of October, 1930, and prior to the appointment of the Receiver herein, said Richfield Oil Company of California, a corporation delivered to claimant, Wells Fargo Bank & Union Trust Co., and particularly to its said Foreign Department, a certain Acceptance Agreement in the amount of $150,000.00, a copy of which said Agreement is annexed hereto, marked Exhibit "B" and by reference made a part hereof.
>
> On or about the 28th day of November, 1930, and prior to the appointment of the Receiver herein, said Richfield Oil Company of Cali-

fornia, a corporation, delivered to claimant, Wells Fargo Bank & Union Trust Co., and particularly to its Foreign Department, a certain Acceptance Agreement in the amount of $5,000.00, a copy [43] of which said Agreement is attached hereto, marked Exhibit "C" and by reference made a part hereof.

Pursuant to the terms of said Agreements hereinbefore referred to and prior to the appointment of a Receiver herein, said Richfield Oil Company, a corporation, delivered to claimant, Wells Fargo Bank & Union Trust Co., and particularly to its Foreign Department, certain drafts drawn by it upon the following persons and for the following amounts and upon the following terms:

RICARDO VALASQUES, Twelve Hundred Nineteen Dollars ($1219.00), maturing April 15, 1931;

BUENO & CO. Twenty-four Hundred Forty-one Dollars ($2441.00), Fifteen Hundred Dollars ($1500.00) of which matured on January 10, 1931;

SOCIEDAD AUTOMAVILIANIA COLOMBIANA, Seven Hundred Seventy-nine and 10/100 ($779.10) Dollars, which matured January 25, 1931, but which maturity date was extended by said Richfield Oil Company of California to February 13, 1931;

ITO BERGONZALI, Fifty-three and Forty-five one-hundredths Dollars ($53.45), maturing January 15, 1931;

BIRLA BROS., Fifty-five Thousand Nine Hundred and 75/100 Dollars ($55,900.75), maturing May 14, 1931;

BIRLA BROS., Sixty-three Thousand Nine Hundred Fifty Dollars ($63,950.00), maturing May 14, 1931;

BIRLA BROS., Twenty-three Thousand Six Hundred Seven and 50/100 Dollars ($23,-607.50), maturing August 19, 1931.

Pursuant to the terms of said Agreements, Exhibits "B" and "C", and particularly the provisions thereof providing that the security deposited thereunder should be held by said Bank not alone as security for the Acceptances referred to in said Agreements, but also as security for any other liability of said Richfield Oil Company of California to claimant, Wells Fargo Bank & Union Trust Co., whether then existing or thereafter [44] contracted, and pursuant likewise to the laws and statutes of the State of California with respect to the banker's lien of claimant and particularly Section 3054 of the Civil Code, claimant asserts a lien upon said drafts and upon all moneys heretofore paid by, or in behalf of the drawees named in said drafts (except as hereinafter set forth) and upon any and all moneys which may hereafter be paid by, or in behalf of the drawees of said drafts and claim is hereby made by claimant against the receivership estate for the balance of said indebtedness to claimant remaining unpaid after crediting the moneys

last hereinabove referred to, paid or to be paid by the drawees of said drafts:

That there has been paid on account of said drafts:

The principal amount of the draft of Ricardo Velasquez, to-wit: the sum of $1219.00, together with $27.63 interest due thereon, against which there was a collection charge of $1.52, making the net sum of $1245.11 collected.

The principal amount of the draft of Bueno & Co. to-wit: the sum of $2441.00, against which there was a collection charge of $15.42, making the net sum of $2425.58 collected.

Of said principal sum of $2441.00 claimant has remitted to the Receiver of Richfield Oil Company of California the sum of $1956.52 (being the sum of $1970.00 collected on account of said draft, less collection charges of $13.48) pursuant to the request of said Receiver hereinafter set forth. Said sum of $1245.11 collected on the draft of said Ricardo Velasquez and said sum of $469.06 (being the sum of $471.00, the balance on account of the draft of Bueno & Co., less the sum of $1.94 collection charges) have been claimed and applied by claimant pursuant to said Agreements marked Exhibits "B" and "C" and pursuant to said banker's lien hereinbefore referred to and said moneys are held as a credit against the indebtedness of said Richfield Oil Company of California to claimant. [45]

With respect to said drafts hereinbefore referred to, said Exhibits "B" and "C" and said banker's lien, claimant sets forth the following further facts:

Upon receiving notice on or about the 15th day of January, 1931, that Wm. C. McDuffie had been appointed as Receiver of Richfield Oil Company of California claimant, in exercise of its banker's lien, applied the balance of moneys on deposit or on hand of Richfield Oil Company of California in the possession of claimant, on account of the then past due indebtedness of said Richfield Oil Company of California to claimant;

On or about the 16th day of January, 1931, said Receiver telegraphed to claimant as follows:

> "As receiver I am ordered by Federal Court to take over all assets including cash in banks stop While you have undoubted right of offset, such right if exercised will seriously cripple receivers operations. It is necessary therefore to request that all banks restore to receiver full cash balance stop Please therefore transfer such funds to a new account on your books in my name as receiver evidence of my authority and signature cards will follow by mail stop Local banks have indicated they will acquiesce in this program."

In response thereto claimant replied to said Receiver as follows:

> "Replying telegram we are willing to restore into your name as Receiver Richfield's balance

in checking account provided we are notified by you that all company's banks have taken similar action Stop We are holding certain collections as security for acceptance Please understand that we continue to reserve all our rights for bankers lien against these collections."

By said last named telegram claimant expressly reserved its right to exercise its lien against said collections held as security for acceptances, including said drafts hereinbefore referred to. Said reservation has at no time subsequently been waived or withdrawn by claimant; except that claimant subsequently remitted to the Receiver the sum of $1956.54 on account of the Bueno & Co. draft hereinbefore referred to. [46]

No part of the security heretofore referred to (except said sum of $1956.54 on account of said Bueno & Co. draft remitted to said Receiver as aforesaid) held by claimant is in any manner waived and with the exception of the security heretofore referred to no other security is held by said claimant for said indebtedness;

That as hereinbefore mentioned affiant and the Note Department of claimant at the time of the execution and filing of claimant's claim, had no knowledge of said securities so held by the Foreign Department of claimant and through inadvertence,

therefore, failed to include said securities in claimant's statement of claim.

F. I. RAYMOND,

Affiant

WELLS FARGO BANK & UNION TRUST CO. a corporation,

Claimant.

Subscribed and sworn to before me this 19th day of May, 1931.

[Seal] AGNES M. COLE,

Notary Public in and for the City and County of San Francisco, State of California. [47]

EXHIBIT "D"

ORDER.

Upon the reading and filing of the petition of Wells Fargo Bank & Union Trust Co. for an order authorizing the petitioner to file herein its Amendment to Proof of Claim and instructing Wm. C. McDuffie, Receiver herein, to receive and accept the same and upon the reading and filing of the stipulation of counsel in reference to the matters in said petition mentioned, and good cause appearing therefor,

IT IS HEREBY ORDERED that Wells Fargo Bank & Union Trust Co. is hereby authorized to file its Amendment to its verified Proof of Claim herein and Wm. C. McDuffie, Receiver herein, is

hereby instructed to receive and accept the same for filing.

IT IS HEREBY FURTHER ORDERED that the receipt and acceptance for filing of said Amendment to Proof of Claim by the said Wm. C. McDuffie, as Receiver herein, shall be without prejudice to the rejection thereof and/or the making of any objection by said Receiver or any other person to its contents or the time and manner of the filing thereof, and without prejudice to the rights of the said Wm. C. McDuffie, as such Receiver, or Richfield Oil Company of California in the cause now pending in the United States District Court, Northern District of California, [48] Southern Division, entitled, "The Republic Supply Company of California, a corporation, complainant, vs. Richfield Oil Company of California, a corporation, defendant—Wm. C. McDuffie, Ancillary Receiver for Richfield Oil Company of California, vs. Wells Fargo Bank & Union Trust Co.," being cause in Equity No. 2758-K in the files of the Clerk of said Court.

Done in open Court at Los Angeles, California, this 29 day of May, 1931.

WILLIAM P. JAMES,
United States District Judge.

[Endorsed]: Due service of the within Answer of Wells Fargo Bank & Union Trust Co., and receipt of a copy thereof are hereby admitted this 25th day of July, 1931.

GREGORY, HUNT & MELVIN,
Attorneys for Complainant.

[Endorsed]: Filed Jul. 25, 1931. [49]

[Title of Court and Cause.]

ANCILLARY AMENDED BILL OF COMPLAINT

By leave of court first had and obtained, William C. McDuffie, as ancillary receiver for Richfield Oil Company of California, a corporation, brings this his amended bill of complaint against Wells Fargo Bank & Union Trust Co., a corporation, and alleges as follows:

I.

That complainant, The Republic Supply Company of California, is a corporation duly organized and existing under the laws of the State of California; that its office and principal place of business is in the City of Los Angeles, State of California, and that it is a citizen and resident of the State of California.

II.

That defendant, Richfield Oil Company of California, is a corporation duly organized and existing under the laws of the State of Delaware; that its [50] office and principal place of business is in the City of Los Angeles, State of California, and that it is a citizen and resident of the State of Delaware.

III.

That defendant, Wells Fargo Bank & Union Trust Co., is a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is in the City and County of San Francisco, State of

California, and that it is a citizen and resident of said State of California.

IV.

That on January 15, 1931, said The Republic Supply Company of California, a corporation, filed an action numbered S-125-J in the District Court of the United States in and for the Southern District of California, Central Division, against said Richfield Oil Company of California, a corporation. That said bill of complaint alleged that said complainant was a California corporation and the said defendant was a Delaware corporation. That said bill of complaint further alleged that said defendant was indebted to said complainant in a sum in excess of $275,000 upon an unsecured open book account for goods, wares and merchandise sold and delivered by said complainant to said defendant. That said bill of complaint further alleged that certain other creditors were pressing said defendant for payment of their claims and threatening attachments, executions, seizures and forced sales of the property of said defendant, with the necessary consequence that said defendant would be compelled to cease its business and that its assets, if sacrificed, might not realize an amount sufficient to pay the creditors of said defendant in full. That said bill of complaint prayed that the rights of all creditors of said defendant be determined and that meanwhile a receiver be appointed of all of the property and assets of said defendant and continue to carry on

the business conducted by said defendant, and that an injunction issue against said defendant, its creditors, stockholders and all persons claiming or acting by, through or under them, to restrain them from interfering in any manner with said receiver or taking possession of the property and assets of said defendant and carrying on and conducting its business. [51]

That said defendant formally appeared and filed its answer to said bill of complaint, admitting the allegations of said bill and consenting to the relief demanded. That upon the same day that the action was commenced, said Court appointed William C. McDuffie as receiver for Richfield Oil Company of California, a corporation, with the powers and duties as to such receivership more fully set forth in the order appointing said receiver, which was duly signed by the Honorable William P. James, United States District Judge then presiding in said Court, at 9:40 A. M. on January 15, 1931, a copy of which order is hereunto annexed, marked Exhibit "A" and made a part hereof. That pursuant to said order, said William C. McDuffie, on said 15th day of January, 1931, duly qualified as such receiver and ever since has been and is now the duly appointed, qualified and acting receiver for said Richfield Oil Company of California, a corporation.

V.

That thereafter, and on said 15th day of January, 1931, in the action of The Republic Supply Com-

pany of California, a corporation, Complainant, v. Richfield Oil Company of California, a corporation, Defendant, duly filed in the District Court of the United States in and for the Northern District of California, Southern Division, No. 2758-K, said William C. McDuffie was appointed ancillary receiver by the Honorable Frank H. Kerrigan, United States District Judge in and for said Northern District of California, Southern Division, of all the property, assets and business of said defendant in the Northern District of California. That a copy of said order appointing said William C. McDuffie such ancillary receiver is hereunto annexed, marked Exhibit "B" and made a part hereof. That pursuant to said order, and on the 20th day of January, 1931, said William C. McDuffie filed his oath of office with the Clerk of the United States District Court in said District and duly qualified as such ancillary receiver and ever since said time has been and is now the duly appointed, qualified and acting ancillary receiver of and for said Richfield Oil Company of California, a corporation, within said Northern District of California. [52]

VI.

That on or about the 12th day of July, 1930, said Richfield Oil Company of California, a corporation, by authorization of its Board of Directors, borrowed from said defendant, Wells Fargo Bank & Union Trust Co., a corporation, the sum of $625,000 and at that time made, executed and de-

livered to said Wells Fargo Bank & Union Trust Co., or order, its promissory note in the principal sum of $625,000, with interest thereon at the rate of six per cent (6%) per annum, payable ninety (90) days after date. That no agreement of any kind for collateral or as security for the repayment of said amount was executed then and there by said Richfield Oil Company of California, a corporation, to or for the benefit of said Wells Fargo Bank & Union Trust Co., a corporation.

VII.

That thereafter, and on or about the month of August, 1930, an agreement was entered into by and between said Richfield Oil Company of California, a corporation, and said Wells Fargo Bank & Union Trust Co., a corporation, whereby said Richfield Oil Company of California, a corporation, agreed to deposit with said Wells Fargo Bank & Union Trust Co., a corporation, for collection, drafts drawn by said Richfield Oil Company of California on certain of its customers residing in foreign countries, which drafts were drawn for payment of certain shipments of commodities by said Richfield Oil Company of California, a corporation, to said customers. That it was then and there further agreed by and between said Richfield Oil Company of California, a corporation, and said Wells Fargo Bank & Union Trust Co., a corporation, that said arrangement for the collection of said foreign drafts by said Wells Fargo Bank & Union Trust Co. was

separate and distinct from any other financial transactions between said parties.

That pursuant to said agreement, said Richfield Oil Company of California, a corporation, thereafter deposited with said Wells Fargo Bank & Union Trust Co., a corporation, certain of its foreign drafts for collection, among which were the following drafts deposited on or about October 8, 1930:

> Draft No. 103005, dated October 8, 1930, drawn by said Richfield Oil Company of California, a corporation, on Birla Brothers, Ltd., at Calcutta, India, in the sum of $63,950, payable at 180 days sight; [53]
>
> Draft No. 103006-B, dated October 8, 1930, drawn by said Richfield Oil Company of California, a corporation, on Birla Brothers, Ltd., at Calcutta, India, in the sum of $55,900.75, payable at 180 days sight.

That in addition to the two drafts hereinabove set forth, said Richfield Oil Company of California, a corporation, thereafter, and on or about January 8, 1931, deposited with said Wells Fargo Bank & Union Trust Co., a corporation, for collection, its draft No. 13107 drawn on Birla Brothers, Ltd., at Calcutta, India, in the sum of $23,607.50, payable at 180 days sight, and which became due upon the 19th day of August, 1931.

VIII

That thereafter and during the months of October and November, 1930, said Richfield Oil Company of California, a corporation, and said Wells Fargo Bank & Union Trust Co., a corporation, made and entered into an agreement that drafts drawn on said Wells Fargo Bank & Union Trust Co. by said Richfield Oil Company of California, a corporation, and payable to said Richfield Oil Company of California, duly endorsed, would be endorsed and accepted for payment by said Wells Fargo Bank & Union Trust Co., termed "Banker's Acceptances," and that such acceptances would be sold up to the amount of $155,000 and the proceeds thereof, less discounts, should be credited to the account of Richfield Oil Company of California, a corporation, at said bank; that in said agreement it was further understood and agreed that the proceeds of said Banker's Acceptances were to be used for financing the exportation of certain goods and commodities then under consideration, and that the proceeds of the sale thereof should be applied to liquidate said acceptances, and that such acceptances were to be payable ninety (90) days after the date of each thereof, and were to be based upon drafts of Richfield Oil Company of California, a corporation, drawn upon its responsible foreign customers for shipments of such goods and commodities, and which said drafts were to be slightly in amount and of a maturity shorter than the Banker's Acceptances for the payment of which before ma-

turity such drafts were respectively reserved and marked

That pursuant to such agreement, and on or about the 8th day of October, 1930, there were delivered to said Wells Fargo Bank & Union Trust Co. by said [54] Richfield Oil Company of California two drafts drawn upon Birla Brothers, Ltd., of Calcutta, India, one numbered 103004 in the amount of $63,950, due and payable at sight, and the other numbered 103006A in the amount of $55,900.76, also due and payable at sight, amounting in all to the sum of $119,850.76; that thereafter and pursuant to said agreement, nine Banker's Acceptances as aforesaid, in the total amount of $115,000, all due January 6, 1931, were executed, negotiated and sold by said Wells Fargo Bank & Union Trust Co. and the proceeds thereof, less the amount of discounts thereon, were credited to the commercial deposit account of Richfield Oil Company of California at said Wells Fargo Bank & Union Trust Co.; that thereafter and pursuant to said agreement, other and additional foreign drafts were deposited under the terms of said agreement and Banker's Acceptances in the aggregate amount of $40,000 were negotiated and sold and the proceeds deposited to the deposit account of said Richfield Oil Company of California at said Wells Fargo Bank & Union Trust Co., as aforesaid; that thereafter, and on the 20th day of February, 1931, the total amount of said Banker's Acceptances so negotiated as aforesaid, in the sum of $155,000, was fully paid and

discharged by the application of the proceeds of said drafts drawn upon customers arising out of the exportation of goods and commodities as aforesaid.

That at the time of making said agreement it was understood and agreed by and between Richfield Oil Company of California and Wells Fargo Bank & Union Trust Co., that the proceeds of the sale of said goods covered by said foreign drafts so deposited pursuant to such agreement as the basis for said Banker's Acceptances should be reserved for and applied to the liquidation of said Banker's Acceptances before the due date thereof, and that any surplus arising therefrom should be held separate and apart from any and all other financial obligations or transactions of Richfield Oil Company of California to or with the Wells Fargo Bank & Union Trust Co.

IX

That at the time of the appointment and qualification of William C. McDuffie as receiver for Richfield Oil Company of California, a corporation, said Richfield Oil Company of California had borrowed, without security, from [55] and was indebted to certain commercial banks in various parts of the United States in an amount exceeding ten million dollars, including said Wells Fargo Bank & Union Trust Co. upon an unsecured note in the amount of approximately $625,000; that in each of said banks, including said Wells Fargo Bank & Union Trust Co., said Richfield Oil Company of California main-

tained a commercial deposit account and deposited therein moneys and the proceeds of collections of checks and drafts, and issued its checks and drafts thereon in the ordinary course of business.

That at or about the time of the appointment and qualification of William C. McDuffie as receiver for Richfield Oil Company of California, a corporation, it was agreed by and between said receiver and each of said banks, including said Wells Fargo Bank & Union Trust Co., that each of said banks would transfer such balances so held in the name of Richfield Oil Company of California to that of William C. McDuffie as its receiver, and would carry on and conduct said commercial accounts in the ordinary course of business as aforesaid, and would not exercise any claim of a banker's lien upon said balances and collections, in order to enable said receiver to carry on and transact the affairs of said Richfield Oil Company of California for the benefit of the creditors thereof, including said Wells Fargo Bank & Union Trust Co., and all others interested in said company, until the termination of such receivership.

That thereupon and thereafter all of said drafts, pursuant to said agreement, transferred said balances to the credit of said receiver and have since continued to carry on and conduct said commercial deposit accounts with said receiver as the same had been conducted with said Richfield Oil Company of California, a corporation, as aforesaid, and have refrained from asserting any claim of banker's

lien or set-off against said balances and collections therein.

That said Wells Fargo Bank & Union Trust Co., in violation of its said agreement by and with said receiver and with said other banks, on the 9th day of May, 1931, notified said Richfield Oil Company of California that it proposed to apply the proceeds of the collection of the drafts hereinbefore mentioned in paragraph VII hereof to its said preexisting unsecured obligation amounting to approximately $625,000; that by so doing a preference in the payment of its said [56] obligation over that of said other banks and creditors of Richfield Oil Company of California similarly situated would be accomplished, to the detriment of said estate under the control of said receiver and all persons interested therein, and an unjust and inequitable advantage would be taken over the other banks and creditors of said corporation, all of which said banks have fully performed and complied with the terms and conditions of said agreement.

That said receiver, in the interest of all of said other creditors of said Richfield Oil Company of California, and acting under and pursuant to the orders of this Honorable Court, demanded the restoration and repayment to his account of said moneys so sought to be applied by said Wells Fargo Bank & Union Trust Co. as aforesaid, and that said Wells Fargo Bank & Union Trust Co. then and there refused and still refuses so to do.

X

That pursuant to its agreement with said William C. McDuffie, Receiver, and said other banks, said Wells Fargo Bank & Union Trust Co. credited the balances of Richfield Oil Company of California, a corporation, to said Receiver's account and continued to make collections of checks and drafts and to make deposits of the proceeds thereof in the ordinary course of business, crediting the same to the account of said Receiver in said bank until the 9th day of May, 1931, as hereinbefore alleged, when, in violation of its said agreement made and executed as aforesaid, said Wells Fargo Bank & Union Trust Co. notified said William C. McDuffie, Receiver, that it intended to apply to the partial liquidation of its unsecured obligation of approximately $625,000 the proceeds of said three drafts described in paragraph VII hereof, then in course of collection as aforesaid.

That thereupon, and on or about the 13th day of May, 1931, said Receiver revoked and withdrew the power and authority of said Wells Fargo Bank & Union Trust Co. to collect and receive the proceeds of said drafts in this paragraph mentioned, and notified said Wells Fargo Bank & Union Trust Co. and its agent and correspondent at Calcutta, India, that the authority of said Wells Fargo Bank & Union Trust Co. and of its correspondent and agent to collect and receive the proceeds of said two drafts maturing May 14, 1931, in the amount of $119,850.76, [57] was revoked and withdrawn;

that notwithstanding such revocation and withdrawing of such authority, said Wells Fargo Bank & Union Trust Co. did, without right or authority, present and collect said drafts, and applied the proceeds thereof to the liquidation in part of its said unsecured obligation of approximately $625,000 hereinbefore mentioned, in violation of the terms of its said agreement and without any right, warrant or authority whatsoever.

XI

That after the appointment and qualification of said William C. McDuffie as receiver for said Richfield Oil Company of California, a corporation, as aforesaid, and on or about the 28th day of March, 1931, said Wells Fargo Bank & Union Trust Co., a corporation, filed with said receiver its proof of claim, which alleged that said

> "Richfield Oil Company of California, a corporation, was on the 15th day of January, 1931, and at the time of the appointment of the Receiver herein and still is, justly and truly indebted to said claimant in the sum of Six Hundred Thirty-six Thousand One Hundred Eighty-nine and 95/100 Dollars ($636,189.95);
>
> The basis of said debt is as follows:
>
> Moneys loaned by claimant to said Richfield Oil Company of California at its special instance and request, evidenced by promissory note dated July 12, 1930, copy of which said promissory note is attached hereto marked Exhibit 'A' and made a part hereof;

Interest on said promissory note from November 30, 1930, to March 16, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

Moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for attorneys fees and preparation of indenture on behalf of creditor banks in the sum of $91.28, together with interest thereon from the 11th day of February, 1931, to the 16th day of March, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

Moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for legal expenses in the sum of $56.39, together with interest thereon from the 4th day of March, 1931, to the 16th day of March, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

That there are no offsets or counterclaims to said debt; no notes or other evidences of indebtedness have been taken or received except those of which copies are hereto attached; no Judgment has been rendered for such indebtedness or any part thereof; and no claim to preference in payment from the receivership estate is made;

That no securities are held by said claimant for said indebtedness." [58]

That no note or other evidence of indebtedness, other than a copy of said note dated July 12, 1930 in the principal sum of $625,000, was attached to said proof of claim.

XII.

That said two foreign drafts dated October 8, 1930, hereinabove set forth in paragraph VII hereof, became due and payable by said drawee on the 14th day of May, 1931, and at said time, said drawee, Birla Brothers, Ltd., paid to Nederlandsche Handel Maatschappij, at Calcutta, India, the correspondent bank of said Wells Fargo Bank & Union Trust Co., a corporation, the full amount of the proceeds of each of said drafts, amounting to the sum of $119,850.75, which said sum is now in the course of transmittal by mail from said Nederlandsche Handel Maatschappij to said Wells Fargo Bank & Union Trust Co., a corporation.

XIII.

That said Wells Fargo Bank & Union Trust Co., a corporation, without right in law or equity, now claims a lien on each of said drafts and the proceeds thereof, and further claims the right and threatens to apply said proceeds, when received from its said correspondent bank, towards the payment of the unsecured indebtedness owing it from said Richfield Oil Company of California, a corporation, evidenced by said promissory note dated July 12, 1930 in the sum of $625,000, plus accrued interest.

XIV.

That said Wells Fargo Bank & Union Trust Co., a corporation, without right in law or equity further claims a lien on the following drafts and the proceeds thereof, which were deposited by said Richfield Oil Company of California therein for collection in the ordinary course of business:

Draft drawn by Richfield Oil Company of California, a corporation, on Ricardo Velasques in the sum of $1,219 maturing April 15, 1931;

Draft drawn by Richfield Oil Company of California, a corporation, on Bueno & Co. in the sum of $2,441, of which $1,500 matured on January 10, 1931;

Draft drawn by Richfield Oil Company of California, a corporation, on Sociedad Automaviliania Colombiana in the sum of $779.10, which matured January 25, 1931, but which maturity date was extended by said Richfield Oil Company of California to February 13, 1931;

Draft drawn by Richfield Oil Company of California, a corporation, on Ito Bergonzali in the sum of $53.45, maturing January 15, 1931. [59]

That said Wells Fargo Bank & Union Trust Co., a corporation, has already applied towards the payment of said unsecured indebtedness owing to it from said Richfield Oil Company of California, a corporation, evidenced by said promissory note dated July 12, 1930, part of the proceeds of said

last mentioned drafts, and threatens, in violation of its said agreements, to so apply the remainder of said proceeds, when received by it from its correspondent bank or banks.

XV.

That pursuant to said order of the District Court of the United States in and for the Southern District of California, Central Division, hereto annexed and marked Exhibit "A", appointing said William C. McDuffie receiver for said Richfield Oil Company of California, a corporation, and pursuant to said order of the District Court of the United States in and for the Northern District of California, Southern Division, hereto annexed and marked Exhibit "B", appointing said William C. McDuffie ancillary receiver for said Richfield Oil Company of California, a corporation, said receiver was authorized forthwith to take and have complete exclusive control, possession and custody of all the property and assets owned by or under the control of or in the possession of said Richfield Oil Company of California, a corporation, real, personal and mixed, of every kind, character and description, within the Ninth Judicial District, and all persons, firms and corporations were forthwith ordered to deliver to said receiver all of said property and assets of said Richfield Oil Company of California, a corporation.

That payment by said Wells Fargo Bank & Union Trust Co., a corporation, to said William C. McDuffie, as receiver for said Richfield Oil Company

of California, a corporation, of the proceeds of all of said drafts is imperative and essential for the continued operations of the business of said Richfield Oil Company of California, a corporation, by said receiver pursuant to the orders of said Courts; that said receiver is the true owner of the proceeds of said drafts, and said Wells Fargo Bank & Union Trust Co., a corporation, has no right, title or interest in or to the same or any part thereof. [60]

WHEREFORE, said William C. McDuffie, ancillary receiver and complainant herein, prays for relief as follows:

1. That said Wells Fargo Bank & Union Trust Co., a corporation, be ordered and directed to forthwith deliver to William C. McDuffie, ancillary receiver, complainant herein, the proceeds of each of the two foreign drafts set forth in paragraph VII hereof immediately upon their receipt by said Wells Fargo Bank & Union Trust Co., a corporation, from said Nederlandsche Handel Maatschappij, without any right of offset or claim thereupon.

2. That said Wells Fargo Bank & Union Trust Co., a corporation, be ordered and directed to forthwith pay over to said William C. McDuffie, ancillary receiver, complainant herein, the proceeds of said foreign draft in the sum of $23,607.50, deposited with it for collection by said Richfield Oil Company of California, a corporation, drawn on Birla Brothers, Ltd., at Calcutta, India, and maturing on August 19, 1931, immediately upon its receipt

by said Wells Fargo Bank & Union Trust Co., a corporation, from said Nederlandsche Handel Maatschappij, and the proceeds of all other foreign drafts deposited with it for collection by said Richfield Oil Company of California, a corporation, without any right of offset or claim thereupon.

3. That temporarily and during the pendency of this suit, an injunction be issued against said Wells Fargo Bank & Union Trust Co., a corporation, and all of its officers, agents and employees, and all other persons claiming or acting by, through or under it, or any or all of them, to restrain them from disposing of any of said drafts or the proceeds thereof, and that said complainant may have such other and further relief in the premises as the needs of the case may require and as may be agreeable to equity.

4. That this Honorable Court give to complainant herein, as receiver, such further directions and instructions relating to the possession of all of said drafts and the proceeds thereof as may by the Court be deemed just and equitable.

5. That a writ of subpoena be granted to said complainant to be directed to said defendant, Wells Fargo Bank & Union Trust Co., a corporation, in this proceeding, requiring said defendant to be and appear before this [61] Honorable Court within the time required by law and the practice of this Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and, further, to perform and abide by such further order,

direction and decree thereof as to this court shall seem meet.

GREGORY, HUNT & MELVIN,
Solicitors for Complainant,
William C. McDuffie, as ancillary receiver of Richfield Oil Company of California, a corporation.
[62]

State of California
City and County of San Francisco—ss.

Ward Sullivan, being first duly sworn, deposes and says:

That he is a member of the firm of Gregory, Hunt & Melvin, the solicitors for William C. McDuffie, ancillary receiver and complainant herein: that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true; that affiant makes this verification on behalf of said William C. McDuffie, ancillary receiver and complainant herein, for the reason that said William C. McDuffie is absent from the City and County of San Francisco, where affiant has his offices.

WARD SULLIVAN

Subscribed and sworn to before me this 28th day of November, 1931.

[Seal] GRACE SONNTAG
Notary Public in and for the City and County of San Francisco, State of California. [63]

EXHIBIT "A"

ORDER APPOINTING RECEIVER

This case came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. William C. McDuffie is hereby appointed receiver of all the property, assets and business owned by or under the control or in the possession of the defendant, Richfield Oil Company of California, real, personal and mixed, of whatsoever kind and description, within the jurisdiction of this court, including all lands, buildings, plants, warehouses, pipe lines, refineries, tanks, ships, shipping facilities, wharves, docks and dockage facilities, and appurtenances, owned, controlled, leased or operated by said defendant, and all raw materials, materials in process of manufacture, finished materials, inventory, stock in trade, equipment, tools, machinery, furniture, supplies, merchandise and books of account, records, and other books, papers and accounts, cash on hand, in bank, or on deposit, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, bills and accounts receivable, and all rents, issues and profits and income accruing and to accrue from said assets, property and business, with authority to take possession of said assets and property and to con-

tinue said business as a going concern.

2. The defendant, its officers and employees, and any persons acting under its direction, shall deliver to the receiver any and all of the aforesaid properties, real, personal or mixed, in their possession or under their control.

3. All creditors, stockholders, and all persons claiming or acting by, through or under them, and all sheriffs and marshals and other officers, agents, attorneys, proctors, representatives, servants and employees, and all other persons, associations and corporations are hereby enjoined and restrained from instituting or prosecuting any action at law, or suit, or proceeding in equity or admiralty against the defendant, in any court of law or equity or admiralty, or before any association, organization or arbitration board, or arbitration by referee or umpire, or other court or tribunal, or otherwise, or from executing or issuing, or causing the execution or issuance, or the issuing out of any court of any writ, process, summons, attachment, subpoena, replevin or other proceeding for the purpose of impounding or taking possession of or interfering with any of the aforesaid property owned by or in the possession or under the control of said defendant, or of the receiver, or owned by the defendant and in the possession of any of its officers, agents or employees, and all sheriffs, marshals and other officers and their deputies, representatives and servants, and all other persons, associations and corporations are hereby enjoined and restrained from

removing, transferring, disposing of or attempting in any way to remove, transfer or dispose of, or in any way to interfere with any of the property, assets or effects in the possession of the defendant or of the receiver, and from doing any act or thing whatsoever to interfere with the possession and management by the receiver of the property and assets, or the business of the defendant, or in any way to interfere with the receiver in the discharge of any of his duties, or to interfere in any manner with the administration and disposition in this suit of the property and affairs of the defendant.

4. Said receiver is hereby authorized forwith to take and have complete exclusive control, possession and custody of all of the property and assets owned by or under the control of or in the possession of the defendant, real, personal and mixed of every kind, character and description within the Ninth Judicial Circuit, and all persons, firms and corporations, including the defendant, its officers, agents and employees, shall forthwith deliver to the receiver all property and assets of the defendant, or in its possession, or under its control, and the defendant, its officers, agents and employees are hereby directed upon the request of the receiver to endorse, transfer, set over and deliver to the receiver any and all shares or certificates of stock, notes, bills of exchange or other documents, or muniments of title outstanding in the name of or in the possession or under the control of the defendant, or as to which the defendant has any interest,

and to execute and deliver powers of attorney and proxies authorizing the receiver to vote on such shares of stock or certificates, and the receiver is hereby authorized to vote in person or by proxy any and all shares of stock standing in the name of the defendant.

5. The receiver is hereby authorized until the further order of this court to continue, manage and operate the business of the defendant, with full power and authority to carry on, manage and operate the business and properties of the defendant, and to buy and sell merchandise and supplies for cash or on credit as may be deemed advisable by said receiver, and to the extent that the receiver may determine that it is for the best interests of the receivership estate so to do, to perform and fulfill the contracts and obligations of the defendant, and to enter into new contracts incidental to the operation of its business, and to appoint and employ such managers, agents, employees, servants, accountants, attorneys and counsel as may in the judgment of the receiver be advisable or necessary in the management, conduct, control or custody of the receivership estate, and the receiver is hereby authorized to make such payments and disbursements out of the property and assets of the defendant in his possession as may be needful or proper for the preservation and operation of the properties and business of the defendant, to issue such receivers' certificates for the purpose of meet-

ing the obligations of said defendant as may be authorized from time to time by this court.

6. The receiver is hereby authorized to receive and collect rents, income and profits of any of the properties of the defendant, whether the same are now due or shall hereafter become due and payable, and to do such things, enter into such agreements, and employ such agents in connection with the management, care, preservation and operation of the properties of the defendant as the receiver may deem advisable, and to incur such expenses and make such disbursements as may in the judgment of the receiver be [64] necessary or advisable, including all bills and accrued charges for electric light and power, gas, water, insurance, freight and carriage charges on goods in transit, telephone charges, taxes and charges of the nature thereof, lawfully incurred or imposed upon the property prior to the receivership, and all claims for accrued wages, salaries and expenses of officers, agents and employees for services rendered prior to the date of this order but remaining unpaid at the date hereof, to the end that the operation of the business of the defendant may not be interfered with or interrupted.

7. The receiver is hereby authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become a party to such suits, actions, proceedings at law, in equity or in admiralty, including ancillary proceedings in

State or Federal Courts as may in the judgment of the receiver be necessary or proper for the protection, maintenance and preservation of the property and assets of the defendant and the conduct of its business, or the carrying out of the terms and provisions of this order, and likewise to defend, compromise and adjust, or otherwise dispose of, any and all suits, actions and proceedings instituted against him as receiver or against the defendant, and also to appear in and conduct the prosecution or defense of any action, suit or proceeding or to adjust or compromise any action, suit or proceeding now pending in any court by or against the defendant where such prosecution, defense or other disposition of such action, suit or proceeding will in the judgment of the receiver be advisable or proper for the protection of the property and assets of the defendant, and in his discretion to compound and settle with all debtors of the defendant, with persons having possession of its property or in any way responsible at law or in equity to the defendant upon such terms and in such manner as the receiver shall deem just and beneficial to the defendant and its creditors.

8. The receiver is hereby given a period of six (6) months from the date hereof within which to arrive at a determination as to what contracts including leases of the defendant the receiver should affirm or disaffirm and within that time to make his

election in that respect; the Court reserves the right if so advised from time to time to extend or diminish the time so granted to the receiver within which to make such election.

9. The receiver shall retain possession and continue to discharge the powers and duties aforesaid until the further order of this Court in the premises; but shall from time to time apply to this Court for such other and further orders and directions as he may deem necessary or advisable for the due administration of the receivership; and the receiver is hereby vested, in addition to the powers aforesaid, with all the general powers of receivers in cases of this kind, subject to the direction of this Court, and the receiver shall from time to time or when directed by the Court render to the Court reports of his proceedings and accountings with respect to all moneys received and disbursed by him or his agents.

10. The bond of the receiver in the sum of Three Million Five Hundred Thousand Dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which may come into his hands and abide and perform all things which he shall be directed to do by this Court, with sufficient sureties to be approved by a Judge of this Court, shall be forthwith filed in the office of the Clerk of this Court.

11. A copy of this order shall, within ten (10) days from the date hereof, be published in two issues of the Los Angeles Daily Journal, a newspaper

of general circulation, printed and published in the City of Los Angeles, State of California.

Dated: January 15, 1931.

WM. P. JAMES,
United States District Judge.

[Endorsed]: Filed Jan. 15, 1931. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk. [65]

EXHIBIT "D"

This cause came on to be heard at this term on motion of the Plaintiff for the appointment of an Ancillary Receiver of the property owned by or under the control of or in the possession of Defendant and located within the jurisdiction of this Court, and upon reading the verified bill of complaint and verified answer in this cause, the bill of complaint and answer filed by the Plaintiff and Defendant in the District Court of the United States for the Southern District of California, Central Division, and the order of the District Court of the United States for the Southern District of California, Central Division, thereunder, made January 15, 1931, appointing William C. McDuffie receiver, and after hearing counsel and it appearing that said William C. McDuffie was appointed receiver upon the bill filed in and upon the order of said Court, of the properties belonging to, or under the control of, or in the possession of defendant, Richfield Oil Company of California, located within

the jurisdiction of said Court, and that said Receiver has filed therein the bond required by said original order.

It is ORDERED, ADJUDGED AND DECREED that this Court take ancillary jurisdiction and that William C. McDuffie be, and he is hereby, appointed Ancillary Receiver of the Richfield Oil Company of California, a Delaware corporation, the defendant above named, in and for the United States Judicial District of the Northern District of California, Southern Division, with all rights, powers, privileges and authorities conferred upon him by the order of the District Court of the United States, for the Southern District of California, Central Division, appointing the said William C. McDuffie as [66] Receiver, dated the 15th day of January, 1931, or by any subsequent order of said District Court of the United States, for the Southern District of California, Central Division, whether heretofore or hereafter made, and that said William C. McDuffie is hereby authorized to perform any and all acts and take any and all steps in the jurisdiction of this Court which the said Receiver has been or may be hereafter authorized to take as Receiver in the jurisdiction of the District Court of the United States, for the Southern District of California, Central Division.

It is further ORDERED, ADJUDGED AND DECREED that the said William C. McDuffie is authorized to act as Receiver herein without tak-

ing any further oath of office or executing any further bond.

It is further ORDERED, ADJUDGED AND DECREED that the defendant, its agents and employees, and all other persons, including creditors of the defendant, are hereby requested and commanded forthwith to deliver all property of every nature belonging to the defendant, or under its control, or in its possession, to the said Ancillary Receiver.

And it is further ORDERED, ADJUDGED AND DECREED that the said defendant and each and every of its agents and employees, and all creditors of the defendant, and all marshals, sheriffs, constables, and all deputies and servants, and all other officers, and, generally, all persons, firms and corporations whatsoever, are hereby enjoined from removing, transferring, disposing of, or attempting to remove, transfer or dispose of, or in any way interfere with any of the properties of the defendant, or from doing anything whatsoever of any nature to interfere with the possession and control of the said ancillary receiver of the property of said defendant.

And it is further ORDERED, ADJUDGED AND DECREED that all creditors, stockholders and all persons claiming or acting by, through or under them, and all sheriffs and marshals and other officers, agents, attorneys, proctors, representatives, servants and employees, and all other persons, as-

sociations and corporations, are hereby enjoined and restrained from instituting or prosecuting any action at law or suit or proceeding in equity or admiralty against the said defendant in any court of law or equity or admiralty, or before [67] any association, organization or arbitration board, or arbitration by referee or umpire or other court or tribunal, or otherwise, or from executing or issuing, or causing the execution or issuance, or the issuing out of any court of any writ, process, summons, attachment, subpoena, replevin or other proceeding, for the purpose of impounding or taking possession of or interfering with any property owned by or under the control of or in the possession of said defendant or of said Receiver; and all sheriffs, marshals and other officers and their deputies, representatives and servants, and all other persons, associations and corporations, are hereby enjoined and restrained from removing, transferring, disposing of or attempting in any way to remove, transfer, dispose of or in any way to interfere with any property, assets or effects in the possession of the defendant or of the Receiver, or owned by the defendant or under its control or in its possession or in the possession or control of any of its officers, agents or employees, and from doing any act or thing whatsoever to interfere with the possession and management by the Receiver of the property and assets of the defendant, or in any way to interfere with the Receiver in the discharge of his

duties, or in carrying on the business of said defendant, or to interfere in any manner with the administration and disposition in this suit of the property and affairs of the defendant.

It is further ORDERED, ADJUDGED AND DECREED that the said Ancillary Receiver shall have leave to apply to this Court for further orders and authority at any time hereafter as may be deemed by this Court proper and shall comply with all orders of the court of original jurisdiction.

It is further ORDERED, ADJUDGED AND DECREED that the said William C. McDuffie file in this court certified copies of all orders affecting the property of said defendant within this district made by the District Court of the United States, for the Southern District of California, Central Division, in said original cause for the information of the Court and all others interested.

Dated: January 15th, 1931.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jan. 15, 1931. Walter B. Mailing, Clerk. By C. W. Calbreath, Deputy Clerk. [68]

[Endorsed]: Receipt of a copy of the within Ancillary Amended Bill of Complaint is hereby admitted this 1st day of December, 1931.

HELLER, EHRMAN, WHITE & McAULIFFE
Solictors for Defendant, Wells Fargo Bank & Union Trust Co.

[Endorsed]: Filed Dec. 1, 1931. [69]

[Title of Court and Cause.]

ANSWER AND DEFENSES OF DEFENDANT WELLS FARGO BANK & UNION TRUST CO. TO ANCILLARY AMENDED BILL OF COMPLAINT.

Comes now Wells Fargo Bank & Union Trust Co. defendant named in the ancillary amended bill of complaint of William C. McDuffie as ancillary receiver of Richfield Oil Company of California, a corporation, and answering said ancillary amended bill of complaint admits, denies and avers as follows, to-wit:

I.

Admits the allegations set forth in Paragraphs I, II and III, of said ancillary amended bill of complaint.

II.

Admits the taking and existence of the proceedings for the appointment of William C. McDuffie as Receiver of the property and [70] assets of Richfield Oil Company of California a corporation as set forth in Paragraph V of said ancillary amended bill of complaint, but denies the jurisdiction of the Court to make the appointment of said Receiver and denies that said William C. McDuffie ever since the 15th day of January, 1931, or from any time subsequent or prior thereto has been and/or now is the duly or otherwise properly appointed and/or qualified and/or acting Receiver for said Richfield Oil Company of California, a corporation, or of the assets or property thereof.

III.

Admits the taking and existence of the proceedings for the appointment of William C. McDuffie as Receiver of the property and assets of Richfield Oil Company of California, a corporation as set forth in Paragraph V of said ancillary amended bill of complaint, but denies that since the 20th day of January, 1931, or any time subsequent or prior thereto, said William C. McDuffie has been and/or now is the duly or otherwise properly appointed and/or qualified and/or acting ancillary receiver of or for said Richfield Oil Company of California, a corporation, within said Northern District of California, or elsewhere, or of the assets or property thereof.

IV.

Admits the allegations set forth in Paragraph VI of said ancillary amended bill of complaint with respect to the borrowing by said defendant Richfield Oil Company of California, a corporation, from said defendant Wells Fargo Bank & Union Trust Co., of the sum of $625,000, and admits that no agreement for collateral or as security for the repayment of said amount was executed at said time by said Richfield Oil Company of California, a corporation, to or for the benefit of said Wells Fargo Bank & Union Trust Co., a corporation, [71] but avers in this respect that subsequently, to-wit, in the months of October, November and December of 1930 and January of 1931, certain collateral security was deposited with said Wells Fargo Bank & Union Trust

Co. as more particularly hereinafter set forth, as security for certain indebtedness of said Richfield Oil Company of California, a corporation, including said indebtedness of $625,000 in said Paragraph VI of said ancillary amended bill of complaint referred to.

V.

Answering the allegations of Paragraph VII of said ancillary amended bill of complaint, said defendant denies that said agreement was as set forth in said Paragraph VII, and specifically denies that said agreement for the deposit of certain foreign drafts by Richfield Oil Company of California with said defendant, was only for the purpose of collection and/or was separate and/or distinct from any other financial transaction or transactions between said parties and denies that said foreign drafts were deposited only for collection and denies that each of said drafts No. 103005 and No. 103006-B were duly accepted for payment by the drawees thereof and admits that the same became due and payable on May 14, 1931, and admits that the draft last referred to in said Paragraph VII, in the sum of $23,607.50, matures for payment on August 19, 1931.

With respect to the agreement under which said drafts were deposited defendant avers that the only agreement between said Wells Fargo Bank & Union Trust Co. and said Richfield Oil Company of California, a corporation, with respect to the deposit of said drafts and the collection and disposition of the proceeds thereof, was as set forth in two certain written contracts each designated "Ac-

ceptance Agreement", duly executed by said Richfield Oil Company of California, a corporation, and addressed to Wells [72] Fargo Bank & Union Trust Co. prior to the receipt or acceptance of said drafts, said Acceptance Agreements being dated respectively October 4th and November 28th, 1930, and being for the establishment of credits in favor of Richfield Oil Company of California, a corporation, in the amounts respectively of $150,000 and $5000; that true copies of said Acceptance Agreements. being the sole contracts between said Richfield Oil Company of California, a corporation and said Wells Fargo Bank & Union Trust Co. with respect to the deposit of said drafts, and the collection thereof and the disposition of the proceeds thereof, are hereto attached and expressly made a part hereof, said Acceptance Agreement dated October 4, 1930 being designated and marked Exhibit "A" and said Acceptance Agreement dated November 28, 1930, being designated and marked Exhibit "B".

VI.

Defendant denies that in the months of October and November 1930, or either thereof or at any time, said Richfield Oil Company of California a corporation, and/or said Wells Fargo Bank & Union Trust Co., a corporation, made or entered into any agreement with respect to drafts drawn on said Wells Fargo Bank & Union Trust Co. by said Richfield Oil Company of California, except only said Acceptance Agreements exhibits "A" and

"B", and denies that said Richfield Oil Company of California and/or said Wells Fargo Bank & Union Trust Co. made or entered into any agreement at any time relating to foreign or other drafts and/or banker's acceptances other than said Acceptance Agreements exhibits "A" and "B", and denies that any agreement was entered into whereby said banker's acceptances in the amount of $155,000 or in any amount, were to be based upon drafts or any thereof, of Richfield Oil Company of California, a corporation, drawn upon responsible foreign customers of said Richfield Oil Company of California for shipment of [73] goods and/or commodities and/or that said drafts were to be slightly greater in amount, or of a maturity shorter than said Banker's Acceptances and in this respect defendant avers that the only agreements with respect to Banker's Acceptances and/or said drafts, are Acceptance Agreements exhibits "A" and "B", wherein and whereby it is agreed that all drafts drawn by Richfield Oil Company of California, a corporation, upon its foreign customers, were to be applied in repayment of said Banker's Acceptances and/or other indebtedness or liability of said Richfield Oil Company of California, a corporation, to said Wells Fargo Bank & Union Trust Co., without any restriction upon the maturity of said drafts and/or the amount thereof and/or the proceeds thereof.

Defendant denies that pursuant to any agreement as set forth in paragraph VIII of said

amended ancillary bill of complaint any drafts were deposited with Wells Fargo Bank & Union Trust Co. or that said drafts Nos. 103004 or 103006B or any other drafts referred to in said paragraph VIII or at all, were deposited pursuant to any such agreement and in this respect defendant avers that any and all drafts deposited with defendant by said Richfield Oil Company of California, including said drafts Nos. 103004 or 103006B were deposited pursuant to said Acceptance Agreements Exhibits "A" and "B", as were likewise other and additional drafts drawn by said Richfield Oil Company of California upon its foreign customers.

Defendant admits that said sum aggregating $155,000 borrowed from said Wells Fargo Bank & Union Trust Co. by said Richfield Oil Company of California pursuant to said Acceptance Agreements Exhibits "A" and "B" was repaid. Defendant denies that any agreement was entered into wherein or whereby it was understood and/or agreed between Richfield Oil Company of California and/or Wells Fargo Bank & Union Trust Co. that the proceeds of the sale [74] of said or any goods covered by said foreign or other drafts should be reserved for and/or applied to the liquidation of said Banker's Acceptances before the due date thereof, or that any surplus arising therefrom should be held separate or apart from any or all other financial obligations or transactions of Richfield Oil Company of California, a corporation, to or with said Wells Fargo Bank & Union Trust Co.

a corporation, and in this respect defendant avers that the agreement of said Richfield Oil Company of California, a corporation, and said Wells Fargo Bank & Union Trust Co., with respect to the deposit of said foreign drafts and the application of the proceeds thereof and the proceeds of the sale of goods covered by said foreign drafts, is set forth in said Acceptance Agreements Exhibits "A" and "B", wherein and whereby it is provided that said drafts and the proceeds thereof and the proceeds of the sale of goods covered thereby, shall be security not alone for the repayment of said moneys borrowed upon said so-called Banker's Acceptances, but likewise as security for any and all other liability of said Richfield Oil Company of California to said Wells Fargo Bank & Union Trust Co. whether existing at the time of the deposit of said drafts or thereafter contracted, all as set forth in said Acceptance Agreements Exhibits "A" and "B".

VII.

Answering the allegations of Paragraph IX of said amended ancillary bill of complaint, defendant having no information or belief sufficient to enable it to answer and placing its denial upon that ground, denies that Richfield Oil Company of California had borrowed, with or without security or otherwise, from and/or was indebted to certain or any commercial or other banks in various parts of the United States or elsewhere, in amount exceeding ten million dollars, or in any amount, except

only the sum of approximately [75] $625,000 borrowed from said Wells Fargo Bank & Union Trust Co. as herein elsewhere set forth, and admits that said sum of $625,000 was so borrowed from said Wells Fargo Bank & Union Trust Co. but denies that said sum was borrowed without security, averring in this respect that although no security was expressly provided for said loan at the time of the making thereof, security was subsequently thereafter obtained, to-wit, the security of said foreign drafts, the proceeds thereof and the proceeds of the sale of the goods covered thereby as set forth in said Acceptance Agreements Exhibits "A" and "B."

Having no information or belief sufficient to enable it to answer and placing its denial upon that ground, defendant denies that in each or any of said banks said Richfield Oil Company of California maintained a commercial deposit or other account and/or deposited moneys therein and/or the proceeds of collections of checks and/or drafts and/or issued its checks and/or drafts thereon in the ordinary course of business, but admits that said Richfield Oil Company of California maintained a commercial deposit account with said Wells Fargo Bank & Union Trust Co.

Having no information or belief sufficient to enable it to answer and placing its denial upon that ground, defendant denies that at or about the time of the appointment and/or qualification of William C. McDuffie as Receiver of said Richfield Oil Com-

pany of California, a corporation, it was agreed by and/or between said Receiver and/or each or any of said banks, or said Wells Fargo Bank & Union Trust Co. that each or any of said banks would transfer such or any balance held in the name of Richfield Oil Company of California, a corporation, to that of William C. McDuffie as its Receiver, or would carry on and/or conduct such commercial accounts in the ordinary course of business and/or would not exercise any claim of [76] banker's lien upon said balances and/or collections for the benefit of creditors of said Richfield Oil Company of California, a corporation and/or of others interested in said corporation or at all, until the termination of such receivership or at all, and in this respect defendant avers that the only agreement ever entered into between said Wells Fargo Bank & Union Trust Co. and said receiver with respect to the account of said Richfield Oil Company of California with said defendant Bank, and the conduct or transfer thereof, arose out of an exchange of telegrams as follows:

On or about the 16th day of January, 1931, said Receiver telegraphed to said Wells Fargo Bank & Union Trust Co. as follows:

> "As receiver I am ordered by Federal Court to take over all assets including cash in banks stop While you have undoubted right of offset, such right if exercised will seriously cripple receivers operations. It is necessary therefore to request that all banks restore to receiver full cash balance stop Please therefore transfer such

> funds to a new account on your books in my name as receiver evidence of my authority and signature cards will follow by mail stop Local banks have indicated they will acquiesce in this program."

and in reply thereto said defendant Wells Fargo Bank & Union Trust Co. telegraphed to said Receiver as follows:

> "Replying telegram we are willing to restore into your name as Receiver Richfield's balance in checking account provided we are notified by you that all company's banks have taken similar action (Stop) We are holding certain collections as security for acceptances Please understand that we continue to reserve all our rights for bankers lien against these collections."

No other agreement except said agreement resulting from the exchange of said telegrams hereinbefore referred to was entered into between said Receiver and said Wells Fargo Bank & Union Trust Co. with reference to the bank balance of said Richfield Oil Company of California and/or the proceeds of any collections or drafts or from the sale of goods represented by drafts and in and by said [77] agreement said defendant Wells Fargo Bank & Union Trust Co. expressly reserved its right to apply the proceeds of said drafts and/or the proceeds of the sale of goods represented by said drafts, as against any indebtedness owing from

said Richfield Oil Company of California to said Wells Fargo Bank & Union Trust Co., and further in this respect defendant avers that any agreement to not apply the bank deposit or other assets in its possession as against the indebtedness of said Richfield Oil Company of California, was made gratuitously and without consideration and is of no legal force or effect.

Defendant admits that it notified said Richfield Oil Company of California on or about the 9th day of May, 1931, that it proposed to apply the proceeds of the collection of the drafts in paragraph VII of said amended ancillary bill of complaint mentioned, to the pre-existing obligation of said Richfield Oil Company of California in the amount of $625,000 more or less, but denies that said notification was in violation of any agreement with said Richfield Oil Company of California and/or with other banks, or of any agreement, and denies that said pre-existing obligation was unsecured, averring in this respect that the same was secured by collateral including drafts and proceeds of drafts in the possession or under the control of said Wells Fargo Bank & Union Trust Co., and in this respect defendant further avers that said Receiver of Richfield Oil Company of California was aware throughout the entire time of his receivership and for several months prior to May 9, 1931, that said Wells Fargo Bank & Union Trust Co. reserved the right and intended to apply the proceeds of said drafts and/or of the sale of the goods represented thereby, in reduction

of said Richfield Oil Company of California's pre-existing indebtedness to it.

Defendant denies that in the application of said drafts [78] against said indebtedness any preference was created in favor of said Wells Fargo Bank & Union Trust Co. over that of other banks and/or creditors of Richfield Oil Company of California similarly or otherwise situated, and denies that any such preference would be accomplished thereby or that any such preference or any preference was or would be accomplished thereby to the detriment of said estate or otherwise or to the detriment of persons interested therein or otherwise.

Defendant denies that the application of said drafts gave defendant an unjust or inequitable advantage over other banks and/or creditors and denies that by said application of said proceeds an unjust or inequitable advantage would be taken over other banks and/or creditors of said Richfield Oil Company of California, and having no information or belief sufficient to enable it to answer and placing its denial upon that ground, denies that all of said defendant banks or any thereof have fully performed and/or complied with the terms and conditions of any agreement with said Receiver, and denies that any such agreement was entered into.

Defendant denies that said Receiver in the interests of any other creditors of Richfield Oil Company of California, or acting under or pursuant to the order of the court, demanded the restoration

or repayment to his account of said moneys so sought to be applied by said Wells Fargo Bank & Union Trust Co. as aforesaid.

Defendant admits that said Receiver requested the restoration and repayment of said moneys which this defendant applied or stated that it would apply against said unsecured indebtedness, but denies that said Receiver in making such demand was acting in the interest of the other creditors of said Richfield Oil Company of California, or at all.

Defendant admits that said Wells Fargo Bank & Union Trust [79] Co. has refused and still refuses to restore the proceeds of said drafts except as otherwise herein set forth.

VIII.

Answering the allegations of paragraph X of said amended ancillary bill of complaint, defendant denies that there was any agreement with said William C. McDuffie, Receiver, and/or with any other banks, for the crediting of the balances of Richfield Oil Company of California to said Receiver's account; admits that certain of the balances in the commercial account of said Richfield Oil Company of California with said Wells Fargo Bank & Union Trust Co. were transferred gratuitously and without consideration to said Receiver; admits that said Wells Fargo Bank & Union Trust Co. continued to make collections of checks and drafts and to make deposits of the proceeds

thereof in the ordinary course of business, but denies that the collection of any foreign drafts, except as elsewhere herein set forth, were applied to the account of said Receiver and admits that on or about the 9th day of May, 1931, said Wells Fargo Bank & Union Trust Co., in pursuance of its previous notification and advice to said Receiver, advised him that it intended to apply to the partial liquidation of its unsecured obligation in excess of $625,000, the proceeds of three drafts and other drafts described in paragraph VII of said amended ancillary bill of complaint, then in course of collection, and the proceeds of other foreign drafts held or deposited with it pursuant to said Acceptance Agreements Exhibits "A" and "B", but denies that said action was in violation of any agreement and denies that there was any agreement between said Wells Fargo Bank & Union Trust Co. and said William C. McDuffie, Receiver, with reference to said drafts, the proceeds thereof and/or the proceeds of the sale of goods represented by said drafts, except only Exhibits "A" and "B".

Defendant denies that on or about the 13th day of May, 1931, [80] or at any time, said Receiver revoked or withdrew the power and authority of Wells Fargo Bank & Union Trust Co. to collect and/or receive the proceeds of said drafts in paragraph X of said amended ancillary bill of complaint mentioned and denies that said Receiver

notified said Wells Fargo Bank & Union Trust Co. and/or its agent and/or correspondent at Calcutta, India, or elsewhere that the authority of said Wells Fargo Bank & Union Trust Co. and/or of its correspondent and/or agent to collect and/or receive the proceeds of two certain drafts maturing May 14, 1931, or of any drafts, in the amount of $119,850.76, or in any amount, was revoked and/or withdrawn; admits that said Wells Fargo Bank & Union Trust Co. did present and collect said drafts and did apply the proceeds thereof in liquidation in part of said unsecured indebtedness in excess of $625,000 hereinbefore mentioned, but denies that said action was without right or authority, denies that said action was in violation of the terms of any agreement, denies that there was any agreement with respect thereto and denies that said action was without right, warrant or authority.

IX.

With respect to the allegations set forth in Paragraph XI of said amended ancillary bill of complaint, defendant admits that defendant Wells Fargo Bank & Union Trust Co. filed, on or about the 28th day of March, 1931, its Proof of Claim with said William C. McDuffie as Receiver for said Richfield Oil Company of California, a corporation, averring in this respect, however, that said claim was filed without consenting to the jurisdiction of said William C. McDuffie as said purported receiver for

said Richfield Oil Company of California, a corporation, and without waiving the rights of said Wells Fargo Bank & Union Trust Co. to attack the jurisdiction of said Receiver to require the filing of claims or to [81] act upon or decide the same, or to liquidate or continue the business of said Richfield Oil Company of California, a corporation, or to retain and dispose of the assets and properties thereof.

Defendant admits that said claim embodied the language purportedly quoted therefrom in Paragraph XI of said amended ancillary bill of complaint and further admits that no note or other evidence of indebtedness, other than a copy of said note dated July 12, 1931, in the principal sum of $625,000, was attached to said Proof of Claim. Further in this respect said defendant avers that at the time of the preparation of said Claim the information therefore was compiled and delivered to said defendant by its Note Department; that said Note Department was then and now is a separate Department of said Wells Fargo Bank & Union Trust Co.; that the Foreign Department of said Wells Fargo Bank & Union Trust Co. was likewise then and now is a separate Department of said Wells Fargo Bank & Union Trust Co.; that said Note Department, at the time of filing said Claim, kept and still does keep, records of loans from and indebtedness to said Wells Fargo Bank & Union Trust Co. evidenced by promissory notes, and had not at that time and has now, no records in its Department of collateral or other security deposited

with said Foreign Department or with any of the other separate Departments of said Wells Fargo Bank & Union Trust Co.; that therefore, through inadvertence and lack of knowledge by said Note Department, said claim stated that there were no offsets or counterclaims to the indebtedness set forth in said claim, and no claim to preference in payment and further stated that no securities were held by said Wells Fargo Bank & Union Trust Co. for said indebtedness whereas at said time the truth and the facts were and now are, that there were and now are certain collateral securities in the possession of Wells Fargo Bank & Union Trust Co., and particularly of its [82] said Foreign Department, as security for all of the said indebtedness of said Richfield Oil Company of California, a corporation, to said Wells Fargo Bank & Union Trust Co., being more particularly, the drafts and/or proceeds thereof, referred to in said ancillary bill of complaint and more specifically hereinafter referred to.

That prior to the filing of said claim, to-wit: on or about the 16th day of January, 1931, in response to a telegraphic request from said William C. McDuffie to said Wells Fargo Bank & Union Trust Co. requesting the restoration of said cash balances upon which said Wells Fargo Bank & Union Trust Co. had prior thereto exercised its banker's lien, said Wells Fargo Bank & Union Trust Co. duly informed said Receiver by telegram and otherwise that it would restore and did restore to said Wil-

liam C. McDuffie as Receiver, the balance in the checking account at Wells Fargo Bank & Union Trust Co. of said Richfield Oil Company of California, expressly stating, however, that said Wells Fargo Bank & Union Trust Co. was holding certain collections, to-wit: said drafts, as security for acceptances and advising said Receiver that said Wells Fargo Bank & Union Trust Co. continued to reserve all of its rights under said agreements, and/or its banker's lien against said collections as security for all indebtedness of said Richfield Oil Company of California to said Wells Fargo Bank & Union Trust Co. Said information was transmitted to said Receiver on or about the 16th day of January, 1931, and at all times subsequent thereto said Wells Fargo Bank & Union Trust Co. has maintained and so advised said Receiver, that it claimed said drafts and/or the proceeds thereof, as security for the indebtedness of said Richfield Oil Company of California, to it, except only that at the request of said Receiver said Wells Fargo Bank & Union Trust Co. subsequently remitted the sum of $1956.52 on account of partial collection received upon a certain [83] draft known as the Bueno & Co. draft hereinafter more specifically referred to.

Upon the discovery of the inadvertence of its Note Department with respect to the preparation of said claim hereinbefore referred to, said Wells Fargo Bank & Union Trust Co. forthwith, to-wit: on or about the 19th day of May, 1931, prepared a

written amendment to claim, a true copy of which Amendment to Claim is attached hereto and marked Exhibit "C" and by reference made a part hereof; there was attached to and made a part of said Amendment to Claim as Exhibits "A", "B" and "C" thereof respectively, a true copy of the Proof of Claim of Wells Fargo Bank & Union Trust Co. hereinbefore referred to and true copies of said Acceptance Agreements Exhibits "A" and "B" to this Answer; said Amendment to Claim including said exhibits thereto, was duly presented to said William C. McDuffie, as Receiver of said Richfield Oil Company of California, on May 20, 1931, but said William C. McDuffie refused to accept the same. Thereupon, forthwith, said Wells Fargo Bank & Union Trust Co. prepared and filed in the District Court of the United States in and for the Southern District of California, Central Division, in the proceedings in which said receivership of said Richfield Oil Company of California was pending, its verified Petition for an order to show cause why the Receiver should not be compelled to receive said Amendment to Claim. Subsequently, after negotiations between the Attorneys for said Wells Fargo Bank & Union Trust Co. and the Attorneys for said Receiver, it was stipulated that said Amendment to Claim, including the exhibits thereto, should be filed, without prejudice to the Receiver's right to subsequently reject the same, or to make any objections to its contents, and the time and manner of filing thereof, and thereafter, on to-wit: the

29th day of May, 1931, it was duly and regularly ordered by the Honorable [84] William P. James, United States District Judge for the United States District Court, Southern District of California, Central Division, in the proceedings there pending, that said Wells Fargo Bank & Union Trust Co. be authorized to file its Amendment to Proof of Claim, including the exhibits thereto, and that said William C. McDuffie as Receiver be instructed to receive and accept the same for filing. A true copy of said order is attached hereto, marked Exhibit "D" and by express reference made a part hereof.

X.

With respect to the allegations set forth in Paragraph XII of said amended ancillary bill of complaint said defendant admits that said drafts dated October 8, 1930, and referred to more specifically in Paragraph VII of said amended ancillary bill of complaint, became due and payable by the drawee thereof on the 14th day of May, 1931, and admits that said drafts were at said time by the drawee thereof, paid to Nederlandsche Handel Maatschappij, at Calcutta, India, but in this respect avers that payment thereof to defendant Wells Fargo Bank & Union Trust Co. was not made until the 10th day of June, 1931, at which time the net proceeds of said drafts, to-wit: the sum of $119,512.54, were received in San Francisco, California, by defendant Wells Fargo Bank & Union Trust Co.

and applied against the outstanding indebtedness of said Richfield Oil Company of California to it.

XI.

Answering the allegations of Paragraph XIII of said amended ancillary bill of complaint said defendant admits that it claims a lien upon each of said drafts referred to in Paragraph VII of said amended ancillary bill of complaint but denies that said claim is without right in law or in equity and admits that it claims a lien [85] upon said drafts and the proceeds thereof and the right to apply the proceeds thereof as and when received by it from its correspondent bank, toward the payment of the unsecured indebtedness owing to it from said Richfield Oil Company of California, as evidenced by said promissory note dated July 12, 1930, in the sum of $625,000, plus accruing interest, and in this respect said defendant avers that said drafts and each of them, and the proceeds thereof, were received by it pursuant to said Acceptance Agreements Exhibits "A" and "B", and under the provisions of the laws of the State of California with reference to banker's liens, as security not alone for the sum of $155,000 advanced pursuant to said Acceptance Agreements, but as security for any and all indebtedness of said Richfield Oil Company of California to said defendant bank, whether existing at the time of the deposit of said drafts or the execution of said Agreements or at any time thereafter existing.

XII.

Answering the allegations of Paragraph XIV of said amended ancillary bill of complaint said defendant admits that it claims a lien upon the drafts set forth in said Paragraph XIV and the proceeds thereof, but denies that said claim to a lien is without right in law or in equity and in this respect defendant avers as follows:

Defendant denies that said drafts, or any thereof, were deposited by said Richfield Oil Company of California for collection in the ordinary course of business, but in this respect avers that said drafts in Paragraph XIV set forth and all thereof, were deposited with said Wells Fargo Bank & Union Trust Co. in accordance with and pursuant to the terms, conditions and covenants of Acceptance Agreements Exhibits "A" and "B".

With respect to the second draft referred to in said [86] Paragraph XIV of said amended ancillary bill of complaint, to-wit: the draft drawn by Richfield Oil Company of California, a corporation, on Bueno & Co., in the sum of $2,441.00, defendant avers that at the request of William C. McDuffie as Receiver of Richfield Oil Company of California, a corporation, it transmitted to him the sum of $1,956.54 on account of the proceeds of said draft received by it, with the express understanding and agreement, however, that the transmittal of said proceeds was for the convenience of said William C. McDuffie and without waiver of any of the rights of said defendant Wells Fargo Bank & Union Trust

Co., pursuant to said Acceptance Agreements and/or under its banker's lien, with respect to the balance of said draft, or of any other of said drafts, or the proceeds thereof.

Further answering the allegations of Paragraph XIV of said amended ancillary bill of complaint, said defendant admits that it has already applied toward the payment of said indebtedness owing it from said Richfield Oil Company of California, evidenced by said promissory note dated July 12, 1930, denying however, that said indebtedness was unsecured, part of the proceeds of said last mentioned drafts and intends, unless precluded by the order of this Court, to apply the remainder of the proceeds of said drafts as and when received by it upon the collection thereof, to the payment of said indebtedness. In this respect defendant avers that it has received and applied the proceeds of said drafts and of the drafts mentioned in Paragraph VII of said amended ancillary bill of complaint, pursuant to the terms, conditions and covenants of said Acceptance Agreements Exhibits "A" and "B", and pursuant to its banker's lien, in the following amounts and as follows: [87]

Drawee	Amount	Date Paid	Amount Received
Bueno & Co.	$2441.00	May 11, 1391 (Bal)	$ 469.06
Ricardo Velasques	1219.00	May 19, 1931	1245.11
Birla Bros. (Drafts Nos. 103005 and 103006-B)	119,850.75	June 10, 1931	119,512.54
Total amount received and credited against said indebtedness of Richfield Oil Co. of California hereinbefore referred to			$121,226.71

XIII.

Answering the allegations of Paragraph XV of said amended ancillary bill of complaint, said defendant denies that said Receiver was at any time authorized forthwith or at any time to take and/or have complete, exclusive or any control or possession or custody of all or any of the property and/or assets owned by or under the control of or in the possession of said Richfield Oil Company of California, a corporation, real, personal or mixed, or of any kind or character or description, within the Ninth Judicial District or elsewhere, and denies that all persons and/or firms and/or corporations were ever validly or properly, or with due or any proper authorization, forthwith or at any time, ordered to deliver to said Receiver all or any of the property or assets of said Richfield Oil Company of California, a corporation, and in that respect defendant expressly avers that said District Court in and for the Southern District of California, Central Division, was without jurisdiction or authority to make said order marked Exhibit "A" to complainant's amended ancillary bill of complaint, or any valid or proper order appointing said William C. McDuffie or any other person Receiver for said Richfield Oil Company of California, a corporation, and denies that said District Court of the United States in and for the Northern District of California, Southern [88] Division, had jurisdiction or authority to make said order marked Exhibit "B" to complainant's amended ancillary

bill of complaint, or any valid or proper order appointing said William C. McDuffie or any other person ancillary receiver for said Richfield Oil Company of California, a corporation.

Further answering the allegations of Paragraph XV of said amended ancillary bill of complaint, defendant denies that the payment by said defendant Wells Fargo Bank & Union Trust Co. to said William C. McDuffie as Receiver for said Richfield Oil Company of California, a corporation, or otherwise, of the proceeds or any thereof, of all or any of said drafts, is imperative or essential for the continued or other operations of the business of said Richfield Oil Company of California by said Receiver pursuant to the order or orders of said Court or Courts, or pursuant to any order or any authority, and in this respect defendant further avers that said Receiver has no authority or jurisdiction to continue the business of said corporation.

Defendant denies that the Receiver is the true owner or the owner, or has any claim to the proceeds of said drafts or any thereof or to said drafts and denies that said Wells Fargo Bank & Union Trust Co. has no right or title or interest in or to the same or any thereof or any part thereof and in this respect defendant expressly avers that upon the deposit of said drafts by it pursuant to said two Acceptance Agreements Exhibits "A" and "B" said Wells Fargo Bank & Union Trust Co. held said drafts and each thereof and the proceeds thereof, as security for any and all indebtedness of said Richfield Oil Company of California, a cor-

poration, to it, including said indebtedness evidenced by said promissory note dated July 12, 1930 in the amount of $625,000 with accruing interest thereon, and that irrespective of said Agreements Exhibits "A" and "B", said defendant held said drafts and/or proceeds thereof at [89] all times subsequent to the maturity of said indebtedness of said Richfield Oil Company of California, a corporation, to said Wells Fargo Bank & Union Trust Co., to-wit: the 10th day of September, 1930, pursuant to the banker's lien of said defendant as created by the laws and statutes of the State of California with the right to apply said drafts and/or the proceeds thereof against said matured indebtedness and that upon the collection of said drafts said defendant, Wells Fargo Bank & Union Trust Co., had and has the right, pursuant to said Agreements and pursuant to its said banker's lien, to apply the proceeds thereof on account of the matured and unpaid indebtedness of said Richfield Oil Company of California, a corporation, to it.

And for a FURTHER, SEPARATE AND SECOND DEFENSE to said amended ancillary bill of complaint, said defendant Wells Fargo Bank & Union Trust Co., admits, denies and avers as follows, to-wit:

I.

Said defendant avers that the above entitled Court is without jurisdiction to determine the question herein presented as to the ownership of the drafts referred to in said amended ancillary bill of complaint and/or the proceeds thereof.

II.

Said defendant avers that the Order of the District Court of the United States for the Southern District of California, Central Division, purportedly appointing said William C. McDuffie as Receiver of said Richfield Oil Company of California, a corporation, and/or of the assets and properties thereof, was improper and unauthorized and made without proper jurisdiction of said Court in said proceedings and furthermore, that the Order of the District [90] Court of the United States for the Northern District of California, Southern Division, purportedly appointing said William C. McDuffie as ancillary Receiver of said Richfield Oil Company of California, a corporation, and/or of the assets and properties thereof, was improper and unauthorized and made without proper jurisdiction of said Court in said proceedings.

III.

Said defendant avers further that said Receiver has no right or authority, nor any jurisdiction to liquidate the affairs of said Richfield Oil Company of California, a corporation, or to continue the business of said corporation, nor has said Receiver any right or authority to fix the time for the presentation of claims against said Richfield Oil Company of California, a corporation, or to pass upon the validity of said claims, or to pay the same, or to preclude the filing of said claims or of amend-

ments to claims, and specifically that said Receiver had and has no jurisdiction to require said Wells Fargo Bank & Union Trust Co. to file its said claim in said receivership proceedings, or to deny to said Wells Fargo Bank & Union Trust Co. the right to file an amendment to said claim or to deny to said Wells Fargo Bank & Union Trust Co. its right to claim said drafts and/or the proceeds thereof as security for said indebtedness of said Richfield Oil Company of California, a corporation, to defendant Wells Fargo Bank & Union Trust Co. on account of the alleged delay in presenting the claim thereto or on account of the alleged waiver by the filing of said defendant's claim against said Richfield Oil Company of California, a corporation, or for any reason.

In this respect defendant further avers that any order of the above entitled Court or of the United States District Court for the Northern District of California, Southern Division, purporting [91] to give to said Receiver, or to said ancillary Receiver, the right to fix a time for the presentation of claims, and/or the right to pass upon and/or reject said claims, and/or to determine the validity or invalidity thereof and/or to determine what security if any said defendant or other claimants may or might have as securing the indebtedness of said Richfield Oil Company of California, a corporation, to it or them, was and is without jurisdiction and made and given in excess of and without the jurisdiction of said Courts or either thereof.

WHEREFORE, said defendant, Wells Fargo Bank & Union Trust Co., prays:

I.

That complainant take nothing by his said amended ancillary bill of complaint.

II.

That the relief sought by complainant in his said amended ancillary bill of complaint be denied.

III.

That said Wells Fargo Bank & Union Trust Co. be authorized and permitted to retain said drafts and/or the proceeds thereof and to apply the same against the indebtedness of said Richfield Oil Company of California, a corporation, to it, or that said complainant be found to be without any right, title or interest in or claim to said drafts and/or the proceeds thereof, and that said Wells Fargo Bank & Union Trust Co. be found to be the owner of said drafts and/or the proceeds thereof, for the purpose of securing the indebtedness of said Richfield Oil Company of California, a corporation, to it, and for the purpose of applying the proceeds of said drafts, as and when received by it, against the unpaid and matured indebtedness of said Richfield Oil Company of California, a corporation, to it. [92]

IV.

That said defendant Wells Fargo Bank & Union Trust Co. recover from said complainant its costs of suit herein incurred.

V.

That defendant Wells Fargo Bank & Union Trust Co. have such other and further relief as to this court shall seem meet.

HELLER, EHRMAN, WHITE AND McAULIFFE,
Solicitors for Defendant, Wells Fargo Bank & Union Trust Co. [93]

State of California,
City and County of San Francisco—ss.

Julian Eisenbach being duly sworn, deposes and says: That he is an officer, to-wit: Vice-President of Wells Fargo Bank & Union Trust Co., a corporation, and as such is authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief and as to those matters he believes the same to be true

JULIAN EISENBACH.

Subscribed and sworn to before me this 14th day of January, 1932.

(Seal) JENNIE DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Feb. 29, 1932. [94]

EXHIBIT "A"

ACCEPTANCE AGREEMENT

(Arising out of importation or exportation of goods)

To WELLS FARGO BANK & UNION TRUST CO., SAN FRANCISCO.

Dear Sirs:

We hand you herewith, for acceptance, the following drafts:

Number	Date	Covering following		Amount
	Oct. 6	Merchandise		$150,000
	Marks	Numbers	Description	

Payable in San Francisco to the order Ourselves

It is agreed that the proceeds of the above will be used for financing the actual goods under consideration, and the proceeds of the sale of the goods shall be applied to liquidate the acceptance.

In consideration of your acceptance of the said draft or drafts the undersigned, jointly and severally, agree to pay you at the time of the acceptance a commission of ..... per cent, and further agree to pay you the amount of the said draft or drafts at your office one day before maturity. We waive all liability on your part in case the goods are not according to contract, either in description, quality, or quantity, or in any other respect. All bills of lading, warehouse receipts and

other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted and bind ourselves to furnish you prior to ..... with shipping documents covering this merchandise or with exchange arising out of the transaction being financed by the credit.

We further agree to give and furnish you on demand additional security or to make payment on account in amounts and character satisfactory to you. If we fail to comply with any such demand or in case of our insolvency, assignment, bankruptcy, or failure in business, all our obligations and liabilities direct or indirect to you whether arising hereunder or otherwise shall forthwith become due and payable without demand or notice. All goods represented by bills of lading, warehouse receipts or other documents of title, pledged with you as security for your acceptances hereunder, shall be at all times covered by us by certificates of insurance under open policies to your order or by specific policies payable to you as your interest may appear, to an amount sufficient to cover your advances or obligations hereunder, and you are to have specific claim and lien on such policies and their proceeds to the amount of your interest in the goods thereby insured. [95]

The undersigned hereby consents to any renewal and extension of time of payment of any draft,

drafts or other indebtedness that may be granted by you, and do also consent that the securities set forth in said acceptance agreement may be exchanged or surrendered from time to time without notice to or further assent from the undersigned, and that the undersigned will remain bound by this guarantee, notwithstanding such changes, guarantees, renewals and extensions.

Upon our failure to comply with any of the terms hereof or upon the non-payment by us of this or any other liability to you when due or at any other time or times thereafter then in such case all obligations and liabilities direct and contingent from us to you whether arising hereunder or otherwise shall at your election forthwith become due and payable without demand or notice and we hereby give to you full power and authority to sell, assign, transfer and deliver the whole or any part of the securities, bills of lading or documents of title or the goods represented thereby or of any securities substituted therefor or added thereto at any broker's board or at any public or private sale with or without notice or advertisement at your option and do further agree that you may become a purchaser at such sale if at any broker's board or at public auction and hold the property or security so purchased as your own property absolutely free from any claim of or in the right of ourselves. In case of any sale or other disposition of the whole or any part of the security or property aforesaid, you may apply the proceeds of such sale or disposi-

tion to the payment of all legal or other costs and expenses of collection, sale and delivery and of all expenses incurred in protecting the security or other property or the value thereof, as hereinafter provided and may apply the residue of such proceeds to the payment of this or of any then existing liability of ours to you whether then payable or not, returning the overplus to us and in case of any deficiency we agree to pay to you the amount thereof forthwith with legal interest. You may also upon any such non-payment apply the balances of all our deposit accounts in the same way that you are authorized to apply the proceeds of any sale of the security or property hereunder.

You may pay taxes, charges, assessments, liens or insurance premiums upon the security or any part of it, or otherwise protect the value thereof or of the property represented thereby, and may charge against us all expenditures so incurred; but you shall be under no duty or liability with respect to the protection or collection of any security held hereunder or of any income thereon, nor with respect to the protection of preservation of any rights pertaining thereto, beyond the safe custody of such security. We hereby agree that if, in your opinion, the market value of the security hereby or hereafter pledged to secure this obligation, after deducting all charges against the same is at any time less than the amount thereof and ..... per centum thereof added thereto we will upon demand, deposit satisfactory additional security so that the

market value of the security pledged hereunder, after deducting all charges, shall always equal the amount of this obligation plus such additional percentage.

We hereby agree to indemnify you against any liability or responsibility for the correctness, validity, or genuineness of any documents or any signatures or endorsements thereon representing goods which you hold, purchase or sell under this engagement, or for the description, quantity, quality or value of the property declared therein, or of any insurance certificates or policies, and against any general loss or charges or other expenses incurred accruing with respect to such goods through delay in transmission of shipping documents or through any other cause, which charges and other expenses we agree to pay. We further agree that no delay on [96] your part in exercising any right hereunder shall operate as a waiver of such rights or of any right under this obligation.

RICHFIELD OIL COMPANY
OF CALIFORNIA,
By R. W. McKEE,
By W. E. HART,
Treasurer.

Dated: October 4, 1930. [37]

EXHIBIT "B"

ACCEPTANCE AGREEMENT

(Arising out of importation or exportation of goods)

To WELLS FARGO BANK & UNION TRUST CO., SAN FRANCISCO.

Dear Sirs:

We hand you herewith, for acceptance, the following drafts:

Number	Date	Covering following	Amount
	Nov. 24	Merchandise	$5000.00
	Marks	Numbers Description	

Payable in San Francisco to the order of Ourselves

It is agreed that the proceeds of the above will be used for financing the actual goods under consideration, and the proceeds of the sale of the goods shall be applied to liquidate the acceptance.

In consideration of your acceptance of the said draft or drafts the undersigned, jointly and severally, agree to pay you at the time of the acceptance a commission of ..... per cent, and further agree to pay you the amount of the said draft or drafts at your office one day before maturity. We waive all liability on your part in case the goods are not according to contract, either in description, quality, or quantity, or in any other respect. All bills of lading, warehouse receipts and

other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted and bind ourselves to furnish you prior to ..... with shipping documents covering this merchandise or with exchange arising out of the transaction being financed by the credit.

We further agree to give and furnish you on demand additional security or to make payment on account in amounts and character satisfactory to you. If we fail to comply with any such demand or in case of our insolvency, assignment, bankruptcy, or failure in business, all our obligations and liabilities direct or indirect to you whether arising hereunder or otherwise shall forthwith become due and payable without demand or notice. All goods represented by bills of lading, warehouse receipts or other documents of title, pledged with you as security for your acceptances hereunder, shall be at all times covered by us by certificates of insurance under open policies to your order or by specific policies payable to you as your interest may appear, to an amount sufficient to cover your advances or obligations hereunder, and you are to have specific claim and lien on such policies and their proceeds to the amount of your interest in the goods thereby insured. [98]

The undersigned hereby consents to any renewal

and extension of time of payment of any draft, drafts or other indebtedness that may be granted by you, and do also consent that the securities set forth in said acceptance agreement may be exchanged or surrendered from time to time without notice to or further assent from the undersigned, and that the undersigned will remain bound by this guarantee, notwithstanding such changes, guarantees, renewals and extensions.

Upon our failure to comply with any of the terms hereof or upon the non-payment by us of this or any other liability to you when due or at any other time or times thereafter then in such case all obligations and liabilities direct and contingent from us to you whether arising hereunder or otherwise shall at your election forthwith become due and payable without demand or notice and we hereby give to you full power and authority to sell, assign, transfer and deliver the whole or any part of the securities, bills of lading or documents of title or the goods represented thereby or of any securities substituted therefor or added thereto at any broker's board or at any public or private sale with or without notice or advertisement at your option and do further agree that you may become a purchaser at such sale if at any broker's board or at public auction and hold the property or security so purchased as your own property absolutely free from any claim of or in the right of ourselves. In case of any sale or other disposition of the whole

or any part of the security or property aforesaid, you may apply the proceeds of such sale or disposition to the payment of all legal or other costs and expenses of collection, sale and delivery and of all expenses incurred in protecting the security or other property or the value thereof, as hereinafter provided and may apply the residue of such proceeds to the payment of this or of any then existing liability of ours to you whether then payable or not, returning the overplus to us and in case of any deficiency we agree to pay to you the amount thereof forthwith with legal interest. You may also upon any such non-payment apply the balances of all our deposit accounts in the same way that you are authorized to apply the proceeds of any sale of the security or property hereunder.

You may pay taxes, charges, assessments, liens or insurance premiums upon the security or any part of it, or otherwise protect the value thereof or of the property represented thereby, and may charge against us all expenditures so incurred; but you shall be under no duty or liability with respect to the protection or collection of any security held hereunder or of any income thereon, nor with respect to the protection of preservation of any rights pertaining thereto, beyond the safe custody of such security. We hereby agree that if, in your opinion, the market value of the security hereby or hereafter pledged to secure this obligation, after deducting all charges against the same is at any time

less than the amount thereof and ..... per centum thereof added thereto we will upon demand, deposit satisfactory additional security so that the market value of the security pledged hereunder, after deducting all charges, shall always equal the amount of this obligation plus such additional percentage.

We hereby agree to indemnify you against any liability or responsibility for the correctness, validity, or genuineness of any documents or any signatures or endorsements thereon representing goods which you hold, purchase or sell under this engagement, or for the description, quantity, quality or value of the property declared therein, or of any insurance certificates or policies, and against any general loss or charges or other expenses incurred accruing with respect to such goods through delay in transmission of shipping documents or through any other cause, which charges and other expenses we agree to pay. We further agree that no delay on [99] your part in exercising any right hereunder shall operate as a waiver of such rights or of any right under this obligation.

RICHFIELD OIL COMPANY
OF CALIFORNIA,
By J. F. WALLACE,
Vice President
By B. B. WILSON.
Assistant Secretary

Dated: November 28, 1930. [100]

EXHIBIT "C"

AMENDMENT TO PROOF OF CLAIM.

State of California,
City and County of San Francisco—ss.

On the 19th day of May, 1931, came F. I. Raymond, of and in said State and City and County, and made oath and says he is authorized to make this proof.

That affiant is Vice-President and Cashier of Wells Fargo Bank & Union Trust Co., a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, claimant herein, and verified this amendment to proof of claim for the following reasons;

That claimant has no Treasurer and that of all its officers the duties of affiant correspond most nearly to those of Treasurer;

That as set forth in the verified claim of claimant filed with the Receiver herein on the 30th day of March, 1931, a copy of which claim is hereunto annexed, marked Exhibit "A" [101] and made a part hereof, Richfield Oil Company of California, a corporation was, on the 15th day of January, 1931, and at the time of the appointment of the Receiver herein, and still is, justly and truly indebted to said claimant in the sum of $636,189.95;

That the basis of said indebtedness is for moneys loaned by claimant to said Richfield Oil Company

of California at its special instance and request, evidenced by a promissory note dated July 12, 1930, a copy of which said promissory note is attached to said verified claim hereinbefore referred to, as Exhibit "A" thereof, together with interest thereon from November 30, 1930, at the rate of six per cent per annum and accruing interest, and also for certain moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for and in behalf of said Richfield Oil Company of California, all as more particularly set forth in said verified claim, Exhibit "A", to which reference is hereby made for the particulars of said claim;

That at the time of the preparation of said claim the information therefor was compiled and delivered to affiant by the Note Department of said claimant, Wells Fargo Bank & Union Trust Co.; said Note Department was then and now is, a separate Department of said Wells Fargo Bank & Union Trust Co.; the Foreign Department likewise was then and now is a separate Department of said Claimant, Wells Fargo Bank & Union Trust Co.; said Note Department at that time kept and does still keep records of loans from and indebtedness to said Wells Fargo Bank & Union Trust Co., evidenced by promissory notes, and had not at that time and has now no records in its Department of collateral or other security deposited with said Foreign Department or with [102] any of the other separate

Departments of said Wells Fargo Bank & Union Trust Co.;

That therefore, through inadvertence and lack of knowledge by said Note Department said claim, Exhibit "A", stated that there were no offsets or counterclaims to the debt set forth in said claim and no claim to preference in payment from the receivership estate was made, and further stated that no securities were held by said claimant for said indebtedness whereas at said time the truth and the facts were and now are, that unknown to said Note Department there were and now are certain collateral securities in the possession of said Foreign Department as security for all of the said indebtedness of said Richfield Oil Company of California to said Wells Fargo Bank & Union Trust Co., claimant herein, more particularly as follows, to-wit:

> On or about the 14th day of October, 1930, and prior to the appointment of the Receiver herein, said Richfield Oil Company of California, a corporation delivered to claimant, Wells Fargo Bank & Union Trust Co., and particularly to its said Foreign Department, a certain Acceptance Agreement in the amount of $150,000.00, a copy of which said Agreement is annexed hereto, marked Exhibit "B" and by reference made a part hereof.
>
> On or about the 28th day of November, 1930, and prior to the appointment of the Receiver herein, said Richfield Oil Company of Cali-

fornia, a corporation, delivered to claimant, Wells Fargo Bank & Union Trust Co., and particularly to its Foreign Department, a certain Acceptance Agreement in the amount of $5,000.00, a copy [103] of which said Agreement is attached hereto, marked Exhibit "C" and by reference made a part hereof.

Pursuant to the terms of said Agreements hereinbefore referred to and prior to the appointment of a Receiver herein, said Richfield Oil Company, a corporation, delivered to claimant, Wells Fargo Bank & Union Trust Co., and particularly to its Foreign Department, certain drafts drawn by it upon the following persons and for the following amounts and upon the following terms:

RICARDO VELASQUES, Twelve Hundred Nineteen Dollars ($1219.00), maturing April 15, 1931;

BUENO & CO. Twenty-four Hundred Forty-one Dollars ($2441.00), Fifteen Hundred Dollars ($1500.00) of which matured on January 10, 1931;

SOCIEDAD AUTOMAVILIANIA COLOMBIANA, Seven Hundred Seventy-nine and 10/100 ($779.10) Dollars, which matured January 25, 1931, but which maturity date was extended by said Richfield Oil Company of California to February 13, 1931;

ITO BERGONZALI, Fifty-three and Forty-five one-hundredths Dollars ($53.45), maturing January 15, 1931;

BIRLA BROS., Fifty-five Thousand Nine Hundred and 75/100 Dollars ($55,900.75), maturing May 14, 1931;

BIRLA BROS., Sixty-three Thousand Nine Hundred Fifty Dollars ($63,950.00), maturing May 14, 1931;

BIRLA BROS., Twenty-three Thousand Six Hundred Seven and 50/100 Dollars ($23,607.50), maturing August 19, 1931.

Pursuant to the terms of said Agreements, Exhibits "B" and "C", and particularly the provisions thereof providing that the security deposited thereunder should be held by said Bank not alone as security for the Acceptances referred to in said Agreements, but also as security for any other liability of said Richfield Oil Company of California to claimant, Wells Fargo Bank & Union Trust Co., whether then existing or thereafter [104] contracted, and pursuant likewise to the laws and statutes of the State of California with respect to the banker's lien of claimant and particularly Section 3054 of the Civil Code, claimant asserts a lien upon said drafts and upon all moneys heretofore paid by, or in behalf of the drawees named in said drafts (except as hereinafter set forth) and upon any and all moneys which may hereafter be paid by, or in behalf of the drawees of said drafts and claim is hereby made by claimant against the receivership estate for the balance of said indebtedness to claimant remaining unpaid after crediting the moneys

last hereinabove referred to, paid or to be paid by the drawees of said drafts:

That there has been paid on account of said drafts:

The principal amount of the draft of Ricardo Velasquez, to-wit: the sum of $1219.00, together with $27.63 interest due thereon, against which there was a collection charge of $1.52, making the net sum of $1245.11 collected.

The principal amount of the draft of Bueno & Co. to-wit: the sum of $2441.00, against which there was a collection charge of $15.42, making the net sum of $2425.58 collected.

Of said principal sum of $2441.00 claimant has remitted to the Receiver of Richfield Oil Company of California the sum of $1965.52 (being the sum of $1970.00 collected on account of said draft, less collection charges of $13.48) pursuant to the request of said Receiver hereinafter set forth. Said sum of $1245.11 collected on the draft of said Ricardo Velasquez and said sum of $469.06 (being the sum of $471.00, the balance on account of the draft of Bueno & Co., less the sum of $1.94 collection charges) have been claimed and applied by claimant pursuant to said Agreements marked Exhibits "B" and "C" and pursuant to said banker's lien hereinbefore referred to and said moneys are held as a credit against the indebtedness of said Richfield Oil Company of California to claimant. [105]

With respect to said drafts hereinbefore referred to, said Exhibits "B" and "C" and said banker's lien, claimant sets forth the following further facts:

Upon receiving notice on or about the 15th day of January, 1931, that Wm. C. McDuffie had been appointed as Receiver of Richfield Oil Company of California claimant, in exercise of its banker's lien, applied the balance of moneys on deposit or on hand of Richfield Oil Company of California in the possession of claimant, on account of the then past due indebtedness of said Richfield Oil Company of California to claimant;

On or about the 16th day of January, 1931, said Receiver telegraphed to claimant as follows:

> "As receiver I am ordered by Federal Court to take over all assets including cash in banks stop While you have undoubted right of offset, such right if exercised will seriously cripple receiver operations. It is necessary therefore to request that all banks restore to receiver full cash balance stop Please therefore transfer such funds to a new account on your books in my name as receiver evidence of my authority and signature cards will follow by mail stop Local banks have indicated they will acquiesce in this program."

In response thereto claimant replied to said Receiver as follows:

> "Replying telegram we are willing to restore into your name as Receiver Richfield's balance

in checking account provided we are notified by you that all company's banks have taken similar action Stop We are holding certain collections as security for acceptance Please understand that we continue to reserve all our rights for bankers lien against these collections."

By said last named telegram claimant expressly reserved its right to exercise its lien against said collections held as security for acceptances, including said drafts hereinbefore referred to. Said reservation has at no time subsequently been waived or withdrawn by claimant; except that claimant subsequently remitted to the Receiver the sum of $1956.54 on account of the Bueno & Co. draft hereinbefore referred to. [106]

No part of the security heretofore referred to (except said sum of $1956.54 on account of said Bueno & Co. draft remitted to said Receiver as aforesaid) held by claimant is in any manner waived and with the exception of the security heretofore referred to no other security is held by said claimant for said indebtedness;

That as hereinbefore mentioned affiant and the Note Department of claimant at the time of the execution and filing of claimant's claim, had no knowledge of said securities so held by the Foreign Department of claimant and through inadvertence,

therefore, failed to include said securities in claimant's statement of claim.

F. I. RAYMOND,
Affiant
WELLS FARGO BANK & UNION TRUST CO. a corporation,
Claimant.

Subscribed and sworn to before me this 19th day of May, 1931.

[Seal] AGNES M. COLE,
Notary Public in and for the City and County of San Francisco, State of California. [107]

EXHIBT "A"

(To Amendment to Proof of Claim)

In the District Court of the United States, in and for the Southern District of California, Central Division.

In Equity

No. S—125—J

THE REPUBLIC SUPPLY COMPANY OF CALIFORNIA, a corporation,

Complainant,

vs.

RICHFIELD OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

PROOF OF CLAIM

State of California,
City and County of San Francisco—ss.

On the 28th day of March, 1931, came F. I. RAYMOND, of and in the said State and County, and made oath and says he is authorized to make this proof.

The Affiant is Vice President and Cashier of Wells Fargo Bank & Union Trust Co., a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, claimant herein, and verified this Proof of Claim for the following reasons:

That claimant has no Treasurer and of all its officers the duties of Affiant correspond most nearly to those of Treasurer;

That the defendant Richfield Oil Company of California, a corporation, was on the 15th day of January, 1931, and at the time of the appointment of the Receiver herein and still is, justly [108] and truly indebted to said claimant in the sum of Six Hundred Thirty-six Thousand One Hundred Eighty-nine and 95/100 Dollars ($636,189.95);

The basis of said debt is as follows:

Moneys loaned by claimant to said Richfield Oil Company of California at its special instance and request, evidenced by promissory note dated July 12, 1930, copy of which said promissory note is attached hereto marked Exhibit "A" and made a part hereof;

Interest on said promissory note from November 30, 1930, to March 16, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

Moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for attorneys fees and preparation of indenture on behalf of creditor banks in the sum of $91.28, together with interest thereon from the 11th day of February, 1931, to the 16th day of March, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

Moneys paid by claimant at the special instance and request of said Richfield Oil Company of California for legal expenses in the sum of $56.39, together with interest thereon from the 4th day of March, 1931, to the 16th day of March, 1931, at the rate of six per cent (6%) per annum, and accruing interest until paid;

That there are no offsets or counterclaims to said debt; no notes or other evidences of indebtedness have been taken or received except those of which copies are hereto attached; no Judgment has been rendered for such indebtedness or any part thereof; and no claim to preference in payment from the receivership estate is made;

That no securities are held by said claimant for said indebtedness.

F. I. RAYMOND,
Affiant.

WELLS FARGO BANK & UNION TRUST CO., a corporation,
Claimant.

Subscribed and sworn to before me this 28th day of March, 1931.

[Seal] DAISY CROTHERS WILSON,
Notary Public in and for the City and County of San Francisco, State of California. [109]

EXHIBIT "A"

(To Proof of Claim)

No. D47304

$625,000. San Francisco, Calif., July 12, 1930

Ninety days after date, for value received, RICHFIELD OIL COMPANY OF CALIFORNIA a Corporation, promises to pay WELLS FARGO BANK & UNION TRUST CO., 4 Montgomery St., San Francisco, SIX HUNDRED TWENTY-FIVE THOUSAND Dollars, in United States Gold Coin of the present standard of weight and fineness, with interest thereon in like gold coin from date hereof until paid, at the rate of 6 per cent per annum, payable monthly, and if not so paid to become part of the principal and bear the like rate of interest, and in the event of commencement of suit to enforce payment of this note, such attorney's fees as the Court may adjudge reasonable.

RICHFIELD OIL COMPANY OF CALIFORNIA,

By R. W. McKEE, Vice President.

By G. P. LYONS, Assistant Secretary. [110]

EXHIBIT "D"

ORDER.

Upon the reading and filing of the petition of Wells Fargo Bank & Union Trust Co. for an order authorizing the petitioner to file herein its

Amendment to Proof of Claim and instructing Wm. C. McDuffie, Receiver herein, to receive and accept the same and upon the reading and filing of the stipulation of counsel in reference to the matters in said petition mentioned, and good cause appearing therefor,

IT IS HEREBY ORDERED that Wells Fargo Bank & Union Trust Co. is hereby authorized to file its Amendment to its verified Proof of Claim herein and Wm. C. McDuffie, Receiver herein, is hereby instructed to receive and accept the same for filing.

IT IS HEREBY FURTHER ORDERED that the receipt and acceptance for filing of said Amendment to Proof of Claim by the said Wm. C. McDuffie, as Receiver herein, shall be without prejudice to the rejection thereof and/or the making of any objection by said Receiver or any other person to its contents or the time and manner of the filing thereof, and without prejudice to the rights of the said Wm. C. McDuffie, as such Receiver, or Richfield Oil Company of California in the cause now pending in [111] the United States District Court, Northern District of California, Southern Division, entitled, "The Republic Supply Company of California, a corporation, complainant, vs. Richfield Oil Company of California, a corporation, defendant—Wm. C. McDuffie, Ancillary Receiver for Richfield Oil Company of California, vs. Wells Fargo Bank & Union Trust Co.," being cause in Equity No. 2758-K in the files of the Clerk of said Court.

Done in open Court at Los Angeles, California, this 29 day of May, 1931.

WILLIAM P. JAMES,
United States District Judge.

[Endorsed]: Receipt of a copy of the within Answer and Defenses of Defendant is hereby admitted this 15th day of January, 1932.

GREGORY, HUNT & MELVIN,
Attorneys for Wm. C. McDuffie as Ancillary Receiver, etc.

[Endorsed]: Filed Jan. 15, 1932. [112]

[Title of Court and Cause.]

NORCROSS, District Judge:

Complainant Receiver's bill of complaint prays for relief requiring defendant Wells Fargo Bank & Union Trust Co. to pay over to him as receiver the proceeds of certain foreign drafts collected by said defendant, totaling the sum of $144,758.79, together with interest and costs. To the bill of complaint defendant bank sets up the right to, and the assertion of, a bankers lien upon the proceeds of said drafts, also the right to the same under the terms of certain acceptance agreements.

On July 12, 1930, Richfield Oil Company gave its note to defendant in the principal sum of $625,000.00, payable ninety days after date, with interest at 6% per annum. The note covered a prior note

then due, and provided for an additional [113] loan which was placed on deposit to the credit of the Oil Company in its general checking account.

In August or September, 1930, Mr. Richard L. Hall came to San Francisco with a view of taking up with the Foreign Department of defendant bank the matter of the bank handling Richfield collections from foreign consignees and extending credit thereon. Hall testified that, although he had the title of Export Manager of Richfield Oil Company, he was not directly employed by that company. His relationship with the company, he stated "was to form and organize an export department for Richfield under joint account with the Richfield Oil", under which arrangement he had been acting for three or four years and until his "resignation" September 1, 1931. The financial interest of Hall in the matter appears to be that he was negotiating sales in foreign territory for the Richfield Company upon a commission basis. At this first meeting with officials of defendant bank, Mr. Hall was accompanied by Homer E. Pope, an official in the Foreign Department of the Richfield Company whose particular duty was to watch foreign collections. Hall had conferences with Mr. Gilstrap and Mr. Hellman of the Foreign Department of defendant bank, and thereafter with Mr. Lipman, President of the bank. During a conference with Gilstrap, the latter suggested the use of acceptances rather than the discount of drafts on customers; that "prime paper

not exceeding ninety days could be handled" at a saving. Hall testified that upon that occasion he asked Gilstrap "to remember that any transactions were to be considered separate from other transactions of the Richfield Company—the entire transactions, monetary, the collection of drafts for * * * the Foreign Department." Concerning a conversation with President Lipman, Hall testified:

> "He (Lipman) said that he would give a further line of credit based on foreign drafts to $150,000 or $200,000 or [114] thereabouts and see how it would work out. I then made it particularly strong to Mr. Lipman as to my position as manager of the Foreign Department, that I would continue to give my very careful attention to the drafts of the Foreign Department for two reasons; that I had a personal interest in the collections of the Department, and that I wanted it considered to be a separate transaction from any of the obligations or any transactions other than those of the Foreign Department—Richfield obligations and mine. Lipman then said, 'That is good' or 'That is excellent.' "

Hall also quoted Lipman as saying:

> "I have accommodated Richfield a great deal, but on an acceptance basis, based on your foreign collections, Mr. Hall, we will extend further credit under the acceptance form."

Mr. Lipman testified concerning the conversation with Hall:

> "The conversation was quite short, and it seems to me that as the conversation came to an end he said something to this effect; That he represented the Foreign Department and not the general treasury relations of the company and he did not want the two mixed up. He wanted them kept separately."

Mr. Frederick J. Hellman, Vice President of defendant bank, and in charge of its Foreign Department, accompanied Hall to the office of President Lipman. Concerning the conversation with Lipman, Hellman testified:

> "As I remember it, we then stood up and were going out the door, and Mr. Hall said to Mr. Lipman, 'Mr. Lipman, I want it understood'—no not that. He said 'You must realize that I am not in the financial end of the business; that I am only the manager of the foreign department, and I will have to get the consent of my superiors to put this credit through.' He further said that he knew we were giving them a credit of $625,000, and that if this acceptance credit was going to interfere with the loan downstairs, he knew they would not consent to it, and he wanted the acceptance credits separate from the loan downstairs."

On cross-examination, to the question:

> "Q. He wanted to have the acceptances considered separate from the $625,000—didn't he make that statement?—Hellman replied:
>
> "A. That is the essence of the statement if it was not the statement."

Hellman further testified:

> "I believe Mr. Lipman said to Mr. Hall, 'We will advance you $150,000, $200,000, $250,000 on your foreign collections.' He made it quite clear—he said to Mr. Hall that this credit was to remain in force until it was cancelled by either side, that we did not know whether it would work out or not; we did [115] not know what kind of foreign collections they were handling, and if it did not work out we reserved the right to cancel the credit."

On or just prior to October 1st, Hall telephoned to Gilstrap advising that Richfield had decided to avail itself of the acceptance credit and requesting that the necessary forms for executions be sent to Los Angeles. This request was complied with by letter of transmittal dated October 1, 1930, reading:

> "In accordance with your request made by telephone today, we enclose forms of acceptances and acceptance agreements. We have completed one specimen acceptance and one specimen acceptance agreement for your guidance. We understood that our Mr. Eisenbach

has discussed the use of these acceptances with your treasurer Mr. R. W. McKee. If you require any further information please do not hesitate to call upon us."

On October 6, 1930, Mr. Hall and Mr. Pope returned to San Francisco, bringing with them the acceptance agreement executed by the Vice President and Treasurer of Richfield Company of date October 4th, and also fourteen signed acceptances in the amount of $150,000, and delivered the same to Mr. Gilstrap. The acceptance agreement as executed, so far as material, reads:

"ACCEPTANCE AGREEMENT"
(arising out of importation or exportation of goods).

"To WELLS FARGO BANK & UNION TRUST CO.—SAN FRANCISCO.

Dear Sirs:

We hand you herewith for acceptance, the following drafts: Number ..... Date Oct. 6, covering following merchandise..... ..... Amount $150,000.00 payable in San Francisco to the order of ourselves.

"It is agreed that the proceeds of the above will be used for financing the actual goods under consideration, and the proceeds of the sale of the goods shall be applied to liquidate the acceptance.

"In consideration of your acceptance of the said draft or drafts the undersigned, * * * agree to pay you * * * the amount of the said

> draft or drafts at your office one day before maturity. * * * All bills of lading, warehouse receipts and other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or [116] thereafter contracted and bind ourselves to furnish you prior to ..... with shipping documents covering this merchandise or with exchange arising out of the transaction being financed by the credit. * * *
>
> "* * * We further agree that no delay on your part in exercising any right hereunder shall operate as a waiver of such rights or of any right under this obligation."

The matter of the blanks in the acceptance agreement came up for discussion at this time. The testimony of Mr. Gilstrap which does not appear to be controverted, was:

> "That the acceptance agreement did not stipulate * * * the exact amount for which each acceptance was drawn because we did not know, nor did they, * * * in what amount the acceptances would be issued, and when they would be issued. * * * Likewise, no mention could be made * * * of the collections which were the security for this particular credit, because, * * * neither they nor we knew exactly what collections would later be sent us. * * * I explained to Mr. Pope that this one agreement was expected to be a blanket one."

At the said time the defendant bank issued its receipt to the Richfield Company for "signed and blank indorsed acceptance forms on this bank, all dated October 6th; four at $5,000.00 each, eight at $10,000.00 each and two at $25,000.00 each," a total of $150,000.00.

Hall and Pope returned to Los Angeles on the night of October 6th, and on the following night Hall returned to San Francisco, bringing with him drafts and documents covering a shipment to Birla Bros., and three letters of date October 7th. All these letters and documents were delivered by Hall to Gilstrap on the morning of October 8th. One of these letters was from G. P. Lyons, Comptroller, and reads:

> "We are sending by Mr. Hall, documents coveirng a shipment to Birla Brothers, Ltd., Calcutta, India. Will you please release against shipment $115,000.00 worth of acceptances made payable at 90 days sight."

One of the other two letters reads:

> "We are enclosing the following enumerated documents covering shipment going forward to Calcutta, India per the M/S 'SILVER HAZEL':
>
> 1. Our draft #103004 amounting to $63,-950.00 drawn at sight on Birla Brothers, Ltd.
> 2. Our draft #103005 amounting to $63, 950.00 drawn at 180 [117] days sight on Birla Brothers, Ltd.

3. Our invoice #930112 in the amount of $127,900.00.
4. Insurance policy in triplicate.
5. Three originals Bill of Lading.

Provided these documents are found to be in order, please forward them to your correspondent bank at Calcutta, requesting them to notify you immediately by wire of non-acceptance or non-payment of Draft at maturity."

(Signed) RICHFIELD OIL COMPANY,
B. D. Blanchard,
Assistant Manager,
Foreign Department."

The other letter with the same address, signature and concluding paragraph reads:

"We are enclosing the following documents covering shipments going forward to Calcutta and Bombay, per the M/S 'SILVER RAY':

1. Our Draft #103006-A amounting to $55,-900.76 drawn at sight on Birla Brothers, Ltd. at Calcutta.
2. Our draft #103006-B amounting to $55,-900.75 drawn at 180 days sight D/A on Birla Brothers, Ltd. at Calcutta." * * *

(Note: Items 3 to 12 refer to invoices, insurance policies and bills of lading.)

Of the drafts receipted for on October 6th, the bank, as of date October 8, 1930, accepted nine thereof in the aggregate amount of $115,000.00; on October 15th, it accepted one in the sum of $5,000.00; on October 21st, one in the sum of $10,-

000.00, and on November 28th, three in the amount of $20,000.00. On November 24, 1930, an "Acceptance Agreement" in similar form to that of date October 4, 1930, was executed by the Richfield Company in the amount of $5,000.00. An additional ninety day sight draft was dated and accepted as of that date.

A letter of date October 21, 1930, from defendant bank to the Richfield Company, referring to the sight draft as of that date, states: "We have ear-marked same against your collection No. 46483 on La Paz, Bolivia," which was a sight draft on the [118] consignee for the amount of $11,031.14.

From October 8th, 1930, to January 15th, 1931, inclusive in addition to the four drafts on Birla Bros. Ltd., heretofore mentioned, the Richfield Company deposited wtih the defendant bank drafts on foreign consignees in the aggregate amount of $101,458.10. This amount is inclusive of two drafts on Birla Bros. Ltd., Calcutta, deposited with the bank January 8, 1931; one at sight for $11,107.50 and the other at 180 days sight for $23,607.50. The total of such drafts on other consignees was $64,221.55.

On December 16, 1930, a letter from the defendant bank to the Richfield Company acknowledges receipt from its Calcutta correspondent of the company's two sight drafts on Birla Bros. Ltd. in the amount of $119,850.76, and advises the Company that the amount, less charges and commissions, has been applied "in anticipation of maturing acceptances."

A letter from the bank of date January 3, 1931, advises Richfield Company of the collection of draft for $11,031.14, "and net proceeds applied in anticipation of acceptances."

On January 15, 1931, plaintiff was appointed and qualified as receiver for the Richfield Oil Company. At the time of his appointment the unsecured indebtedness of the Richfield Company to various banks throughout the country was approximately ten million dollars.

On the day following his appointment the receiver held a conference with representatives of a number of creditor banks at Los Angeles. The receiver testified concerning this conference:

> "I told the bankers at this meeting that the conditions were such that if they felt it was necessary to seize these balances I, as receiver, should not carry on and that the receivership must be immediately terminated and it would be necessary to go immediately into bankruptcy.
>
> "I told them that it was not only necessary that I have the balances restored, but that I have their assurance that the [119] normal flow of business would be allowed to go on. Collections were coming in, of course. If they merely restored my balances it would be obvious that it would be impossible to carry on the business if collections were seized. I asked them if they would not restore to me all funds that might be available. I particularly brought to their attention that, after all, the receivership was

created to protect the state and to carry it on, and without funds it was utterly impossible to carry on the estate."

At the conclusion of the meeting a telegram was prepared by some of the bankers present in cooperation with the receiver to be sent by the receiver to creditor banks not represented at the meeting. The telegram reads:

"As receiver I am ordered by Federal Court to take over all assets including cash in banks. While you have undoubted right to offset, such right if asserted will seriously cripple receiver's operations. It is necessary therefore to request that all banks restore to receiver full cash balances. Please therefore transfer such funds to a new account on your books in my name as receiver. Evidence of my authority and signature cards will follow by mail. Local banks have indicated they will acquiesce in this program."

Mr. Edward J. Nolan, an executive of the Bank of America, the largest bank creditor, and who was one of those present at the meeting with the receiver, at the suggestion of the receiver called Mr. Eisenbach of defendant bank by telephone. Concerning this phone conversation Nolan testified, "I tried to pass it to Mr. Eisenbach just what took place at the meeting."

To the telegram of the receiver Mr. Eisenbach replied the same day by wire, reading:

"Replying telegram we are willing to restore into your name as receiver Richfield's

balance in checking account provided we are notified by you that all company's banks have taken similar action. We are holding certain collections as security for acceptances please understand that we continue to reserve all our rights for bankers lien against these collections."

On January 17, 1931, Eisenbach wrote to the receiver, in which letter attention was called to the fact that no reply had been received "to our telegram of January 16", and after quoting the telegram, said:

"Pending notification by you that all of the company's [120] banks have restored to the receiver the company's cash balances, we have taken no action towards such restoration on our part."

To this letter the receiver replied by telegram of date January 22nd, as follows:

"All banks have now expressed their willingness to replace Richfield Oil Company's offset balances of January 15th to the credit of receiver. Will therefore greatly appreciate your at once transferring such sums to my credit advising me the amount by wire collect. Wish express appreciation your cooperation as these funds will be of great assistance."

To the receiver's telegram, Eisenbach, by telegram, replied:

"Answering wire have today placed to your

> credit Richfield Oil Companys offset balance of January fifteenth amount forty thousand eight hundred seventy four dollars seven cents."

Letters from the bank to the receiver of dates January 26, 28, February 2, 3, 4, 13, acknowledge payment of several drafts on foreign consignees and the application of the proceeds in anticipation of acceptances in the amount of $25,000.00 due February 26, 1931.

A letter from the defendant bank to the receiver of date February 26, 1931, acknowledges receipt of payments on three certain drafts on foreign consignees totaling $7,760.81, also that partial payment on another draft in the sum of $1,500.00 has been received. The letter then proceeds to say:

> "From the four months above mentioned, the sum of $1499.70 has been taken to meet the balance due on acceptances maturing today. The remainder of the proceeds we are holding in accordance with the notice given you by our wire of January 16."

On March 3, a letter to the bank by Mr. Pagen for the receiver, states:

> "Referring to your letter of February 26 * * * and referring to your telegram of January 16, I beg to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15th, 1931, to the credit of Wil-

liam C. McDuffie, receiver. I will therefore appreciate it if you will kindly credit the remainder of the proceeds as mentioned above, $7749.58, to the credit of Richfield Oil Company of California, William C. McDuffie, Receiver, and advise as soon as this transfer has been made." [121]

In reply to the letter last above quoted Mr. Gilstrap, in a letter of date March 5th, wrote:

> "In accordance with your request, we are crediting the account of William C. McDuffie, Receiver, Richfield Oil Company of California, with the sum of $7749.58.
>
> "We are also crediting this account with $11,082.51, representing proceeds of collection No. 13106 of the Richfield Oil Company of California, particulars as per memorandum attached."

On March 5, 1931, the unpaid balance of the total amount of the bank's acceptances, aggregating $155,000.00 was paid.

Of drafts on foreign consignees deposited by Richfield Company with defendant bank subsequent to the acceptance agreement of October 6, 1930, and prior to the receivership, there was collected by the defendant bank the amount due on six thereof totaling $5,278.99, the net proceeds, of which $5,255.86 was credited to the account of the Richfield Company.

Of ten drafts on foreign consignees deposited by Richfield Company between October 11, 1930 and January 15, 1931, both dates inclusive, in the aggregate amount of $26,011.81, and which were collected by the bank between March 5 and April 22, 1931, both dates inclusive, the net proceeds thereof, $25,996.08, were credited to the account of the Receiver.

The drafts on foreign consignees upon which a bankers lien or security under acceptance agreements is claimed on the net proceeds thereof, are four in number. On two drafts on Birla Bros. Ltd., deposited October 7, 1930, paid June 16, 1931, net amount $119,512.54; draft on the same consignee deposited January 8th and paid September 10, 1931, net amount $23,532.08; Ricardo Volozquez, deposited December 27, 1930, paid May 18, 1931, net amount $1,245.11, and balance of draft on Bueno y Cia paid May 11, 1931, net amount $469.06, a total of $144,758.79. Of the last mentioned draft, Bueno y Cia, the original draft was for $2441.00 delivered to the bank on October 11, 1930, upon which $1500.00 was paid February 24, 1931, and [122] applied on bank acceptances; a second installment in the amount of $470.00 was paid April 7 and credited to the account of the receiver.

On March 30, 1931, defendant bank filed with the receiver verified proof of claim in the amount, as of that date, $636,189.95, which in the main covers the principal of the note of July 12, 1930, with ac-

crued interest. The claim as filed concluded with the statement: "That no securities are held by said claimant for said indebtedness."

On May 29, 1931, defendant bank, in pursuance of an order of court, filed an amendment to its proof of claim. The order of court provided that the filing of such amendment shall be without prejudice to the * * * making of any objection * * * to its contents * * * and without prejudice * * * in the cause now pending"—this cause.

The affidavit of F. I. Raymond, Vice President and Cashier of defendant bank, being a part of the amended claim, among other matters, avers:

> "That at the time of the preparation of said claim the information therefor was compiled and delivered to affiant by the Note Department of said claimant, * * * separate department; the Foreign Department was then and now is a separate department of claimant * * *; said Note Department * * * had not at the time and has now no records * * * of collateral or other security deposited with the said Foreign Department or with any of the other separate departments * * *;
>
> "That therefore, through inadvertence and lack of knowledge by said Note Department said claim * * * stated that there were no offsets or counterclaims to the debt set forth in said claim * * * and further stated that no securities were held by said claimant for said indebtedness whereas at said time the truth

and the facts were and now are * * * certain collateral securities in the possession of said Foreign Department as security for all of the said indebtedness * * * more particulary as follows:"

Here follows a reference to the two acceptance agreements of date October 4th and November 24, 1930, for $150,000.00 and $5,000.00 respectively, the drafts upon which bankers liens are claimed; the telegram received from the receiver on January 16, 1931, and the reply thereto of same date and copies of the same [123] are attached as exhibits to the amended claim.

It is the contention of complainant receiver that the defendant bank is without right to assert a bankers lien or other claim upon the proceeds of the drafts in question for the reason that it was agreed between the bank and Richfield Company that collections on foreign drafts should be deemed to be separate and apart from other business and financial obligations of the Richfield Company with the bank, and for the further reason that by its telegram of January 16, 1931, it waived any such asserted lien.

It is defendant's contention that the drafts, the proceeds of which are in quetsion as to whether the same may be applied upon the general indebtedness of Richfield Company, were deposited in pursuance of the acceptance agreement as security not alone for the acceptances issued thereunder, but likewise as expressed in such agreement, for "any

other liabilities," and that the written agreement may not be varied by an oral agreement to the effect that all foreign drafts should be kept "separate and apart" from other transactions, and that there has been no waiver of defendant's rights.

The acceptance agreement relied upon is not an instrument complete in itself. To determine what the actual agreement between the parties was resort must be had to other written instruments and correspondence, and their connection or relation to the agreement explained by parol.

There is no conflict in the testimony respecting the fact that when Mr. Hall and Mr. Pope called upon the representatives of the Foreign Department of the defendant bank the statement was made by Mr. Hall to the effect that foreign drafts were to be regarded separate and apart from the other financial transactions between the Richfield Company and the bank, and that this statement was later repeated at the conference between Hall and [124] President Lipman. While witnesses were not in accord respecting their recollections of certain details discussed at this first interview, there is, as stated, no conflict with respect to the statement made by Mr. Hall. It is not disputed that Mr. Gilstrap suggested the use of acceptances rather than the discount of drafts, and Mr. Hall quoted President Lipman as saying "We will extend further credit under the acceptance form." The testimony of witnesses for defendant, however, fails to disclose any direct statement to Mr. Hall that his

suggested condition could not or would not be carried out. That there was such an oral agreement is satisfactorily established. The terms of an executed written agreement cannot be varied by a prior or contemporaneous oral agreement. We are here, however, dealing with a contract which in its entirety was not reduced to writing. The acceptance agreements, in the form executed, by themselves are unintelligible; that is, it cannot be ascertained therefrom what drafts are referred to; what merchandise is covered thereby; what transactions are financed by the credit, or what exchange based thereon. As explained by Mr. Gilstrap, neither party knew in what amount or when the acceptances would be issued, and "likewise no mention could be made * * * of the collections which were the security for this particular credit." It is necessary to resort to the testimony to determine what drafts constituted the basis for acceptances issued. Not all drafts deposited with the bank could be or were so considered. So far as the issuance of acceptances was concerned it quite conclusively appears that, as stated by Mr. Gilstrap, they were to be based upon "prime paper not exceeding ninety days." In addition to the 180 day sight drafts, a number of other drafts were not considered available for acceptances. The question here involved is,—were such drafts security for acceptances which, primarily at [125] least, were based on other drafts, and more particularly, as expressed in the acceptance agreement, security "for any other

liability"? It is clear that the drafts which were not considered as a basis for acceptances, were subject to the oral agreement, and that they were not security fo rthe general indebtedness of the Richfield Company to the bank under the provisions of the acceptance agreements.

It is plaintiff's contention that under the oral agreement to keep separate and apart the foreign business from that of other business with the bank, all drafts on foreign consignees other than those used as a basis for acceptances were deposited for collection merely, and that such drafts were not only not subject to the acceptance agreement, but the oral agreement constituted a waiver of any bankers lien on the proceeds of such drafts. In reply to this contention, particularly as it relates to the two Birla Bros. 180 days sight drafts deposited October 8, 1930, counsel for defendant call attention to the letter of Comptroller Lyons of date October 7th, in which it is stated: "We are sending by Mr. Hall, documents covering a shipment," etc., and the two accompanying letters signed by the assistant manager of the Foreign Department, in which are mentioned not only the invoices and bills of lading, but the sight and 180 days sight drafts. It is contended that these letters show the latter drafts to be also "security under the acceptance agreement." It is instructive to consider what, if any, security was or could be afforded by the 180 days sight drafts. If the sight drafts were paid upon presentation, the acceptances issued on ac-

count of that shipment would be fully covered. If they were not so paid the bank would be compelled to rely on its authority to sell the merchandise constituting the shipment of which it held the invoices and bills of lading. In that event the 180 days sight drafts would be worthless [126] paper. As testified by Mr. Gilstrap, it was "the collections which were the security for this particular credit."

The subsequent conduct of the parties supports the contention of plaintiff that it was understood and agreed between the Richfield Company and defendant that transactions between the Foreign Departments of the two companies were to be regarded as separate and distinct from other transactions, the effect of which was a waiver upon the part of defendant of any bankers lien on collections upon foreign drafts otherwise than in respect to acceptances based on such transactions. Both prior and subsequent to the receivership collections upon foreign drafts which were not a basis for acceptances were deposited to the credit of the checking account of the Richfield Company. Drafts aggregating more than $30,000 were so deposited. The letters of defendant bank of February 26th and March 5th, and that of Mr. Pagen for the receiver of March 3, 1931 are significant. As a result of that correspondence not only was the balance of $7749.58 remaining after all acceptances had been paid, placed to the credit of the receiver, but in addition thereto a further collection received in the sum of $11,082.51. There is no comment in the letter of

Gilstrap of March 5th, advising the receiver of these deposits, in reference to the expression in his letter of February 26th—"The remainder of the proceeds we are holding in accordance with the notice given you by our wire of January 16."

Much argument has been advanced by counsel for both parties respecting the meaning of a portion of said wire of January 16th—"We are holding certain collections as security for acceptances please understand that we continue to reserve all our rights for bankers lien against these collections."

Counsel for plaintiff contend that the plain meaning of this expression is that certain of the collections only were [127] being held as security for acceptances, and that all others, including those involved in this suit, were not so held. It is further contended that it was the understanding acquiesced in by all creditor banks that such collections were to be deposited to the credit of the receiver; and the action of Security-First National Bank of Los Angeles, the only other bank handling foreign drafts, in so depositing collections on six such drafts totaling $152,524.03, is cited in support of the contention that such was the understanding.

It is urged by counsel for defendant that the word "certain" as used in the telegram, is not a word of limitation, and that the expression "all our rights for bankers lien" is comprehensive, and applies to the collections here involved; that the only waiver of lien referred to in either the telegram of the receiver or the reply thereto of date

January 16th was in relation to the balance in checking account.

In the view the court takes of this case it is unnecessary to determine whether the exchange of telegrams of January 16th would constitute a waiver upon the part of defendant bank of all lien rights otherwise than as security for acceptances. It is the conclusion of the court that there was such waiver growing out of the understanding between the parties in relation to collections on foreign drafts and acceptances based thereon, that the transactions between the foreign departments of the two contracting parties be kept separate and distinct from other financial transactions. Whatever otherwise might be said to be the effect of defendants' wire of January 16th, it is not inconsistent with the view that defendant had long before waived its rights of lien in respect to the collections involved in this suit. Reynes v. Dumont, 130 U. S. 354; Union Bank & Trust Co. v. Loble, 20 F (2d) 124; Buckner v. Leon & Co., 204 Cal. 225; Campbell v. Miller, 205 Cal. 22; Blahnik v. Small Farms Imp. Co., 181 Cal. 379; Savings Bank v. Ashbury [128] 117 Cal. 96; Smith v. Smith, 200 S. W. (Tex.) 545.

Complainant is entitled to a decree as prayed in his bill of complaint requiring defendant to pay over to him as such receiver the proceeds of certain foreign drafts described in the complaint collected by defendant and totaling the sum of $144,758.79. It is ordered that a decree be entered accordingly.

The respective parties may submit proposed findings, conclusions and form of decree.

Dated this 11th day of March, 1933.

FRANK H. NORCROSS
District Judge.

[Endorsed]: Filed, Mar. 13, 1933 [129]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action came on regularly for trial on July 6, 1932, before the above entitled court, sitting without a jury, a jury having been specifically waived by the parties hereto, Honorable Frank H. Norcross presiding, Messrs. Gregory, Hunt & Melvin and Sullivan, Roche, Johnson & Barry apearing as counsel for complainant William C. McDuffie, as ancillary receiver of Richfield Oil Company of California, a corporation, and Messrs. Heller, Ehrman, White & McAuliffe appearing as counsel for defendant Wells Fargo Bank & Union Trust Co., a corporation, and evidence both oral and documentary having been introduced on behalf of the parties and the matter having been thereafter submitted to the court for decision and the court being fully advised in the premises now renders herein its findings of fact and conclusions of law:

FINDINGS OF FACT.

The court finds as follows, to-wit:

I.

Complainant The Republic Supply Company of California is a California [130] corporation, having its principal place of business in Los Angeles, California, and is a citizen and resident of said state.

II.

Defendant Richfield Oil Company of California is a Delaware corporation, having its principal place of business in Los Angeles, California, and is a citizen and resident of the State of Delaware.

III.

Defendant Wells Fargo Bank & Union Trust Co. is a California corporation, having its principal place of business in San Francisco, California, and is a citizen and resident of said state.

IV.

On January 15, 1931, in an action commenced in the District Court of the United States, in and for the Southern District of California, Central Division, and entitled "The Republic Supply Company of California, a corporation, Complainant, v. Richfield Oil Company of California, a corporation, Defendant, In Equity No. S-125-J, said court made and entered its order appointing William C. McDuffie receiver of all the property, assets and business of said Richfield Oil Company

of California, and ever since said time William C. McDuffie has been and now is the duly appointed, qualified and acting receiver for said Richfield Oil Company of California, authorized by said order to take forthwith and have complete, exclusive control, possession and custody of all the property and assets, of every kind, character and description, within the Ninth Judicial Circuit, owned by or under the control or in the possession of said Richfield Oil Company of California, and all persons, firms and corporations by said order were forthwith directed to deliver to said receiver all of said property and assets of said Richfield Oil Company of California.

V.

Thereafter and on said 15th day of January, 1931, in an action commenced in the District Court of the United States, in and for the Northern District of California, Southern Division, and entitled "The Republic Supply Company of California, a corporation, Complainant, v. Richfield Oil Company of California, a corporation, Defendant", In Equity No. 2758-K, said court made and entered its [131] order appointing said William C. McDuffie ancillary receiver of all the property, assets and business of said Richfield Oil Company of California in said Northern District of California; thereafter and on January 20, 1931, said William C. McDuffie duly qualified as such ancillary receiver and ever since said time has been and now is the duly appointed, qualified and acting ancillary re-

ceiver of and for said Richfield Oil Company of California within said Northern District of California, authorized by said order to take forthwith and have complete, exclusive control, possession and custody of all the property and assets, of every kind, character and description, within said Northern District of California, owned by or under the control or in the possession of said Richfield Oil Company of California, and all persons, firms and corporations by said order were forthwith directed to deliver to said ancillary receiver all of said property and assets of said Richfield Oil Company of California.

VI.

On or about July 12, 1930, said Richfield Oil Company of California became indebted to said Wells Fargo Bank & Union Trust Co. in the sum of $625,000.00, and at said time made, executed and delivered to said bank its promissory note, without security, evidencing said indebtedness, payable ninety days after date, with interest thereon at the rate of six per cent per annum. At said time no agreement of any kind for collateral or as security for the repayment of said amount was executed by said Richfield Oil Company of California to or for the benefit of said bank.

VII.

Thereafter and during the month of August, 1930, an oral agreement was entered into between said Richfield Oil Company of California and said

defendant bank whereby said Richfield Oil Company of California agreed to deposit with said bank, for collection only, drafts drawn by said Richfield Oil Company of California on certain of its customers residing in foreign countries, which drafts were drawn for payment of certain shipments of commodities by said Richfield Oil Company of California to said customers. It was then and there further orally agreed by and between said Richfield Oil Company of California and said bank that the collection of said foreign drafts by said bank should be entirely separate and [132] apart from all other financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business, between said parties.

VIII.

Pursuant to and under and in reliance upon said agreement of August, 1930, said Richfield Oil Company of California thereafter deposited with said bank, for collection only, and not as security for the payment of the above or any indebtedness owing from said Richfield Oil Company of California to said bank, the following drafts:

Draft No. 103005, dated October 8, 1930, drawn by said Richfield Oil Company of California on Birla Bros., Ltd. at Calcutta, India, in the sum of $63,950.00, and payable at 180 days sight.

Draft No. 103006B, dated October 8, 1930, drawn by said Richfield Oil Company of California on Birla Bros., Ltd. at Calcutta, India,

in the sum of $55,900.75, and payable at 180 days sight.

Draft No. 13107, dated January 8, 1931, drawn by said Richfield Oil Company of California on Birla Bros., Ltd. at Calcutta, India, in the sum of $23,607.50, and payable at 180 days sight.

Draft No. 123014, dated December 27, 1930, drawn by said Richfield Oil Company of California on Ricardo Velazquez, in the sum of $1219.00.

IX.

On or about the maturity thereof draft numbered 103005, dated October 8, 1930, in the sum of $63,-950.00, hereinabove and in finding VIII hereof more particularly described, was paid in full by said drawee thereof and thereafter and on or about June 10, 1931, the net proceeds of said draft were received by defendant bank at San Francisco, California.

On or about the maturity thereof draft numbered 103006B, dated October 8, 1930, in the sum of $55,900.75, hereinabove and in finding VIII hereof more particularly described, was paid in full by said drawee thereof and thereafter and on or about June 10, 1931, the net proceeds of said draft were received by defendant bank at San Francisco, California. Said aggregate net proceeds of said two last mentioned drafts so received by defendant bank amounted to $119,512.54.

On or about the maturity thereof draft numbered 13107, dated January 8, 1931, in the sum of $23,-607.50, hereinabove and in finding VIII hereof more [133] particularly described, was paid in full by said drawee thereof and thereafter and on or about September 10, 1931, the net proceeds of said draft, amounting to $23,532.08, were received by defendant bank at San Francisco, California.

On or about the maturity thereof draft numbered 123014, dated December 27, 1930, in the sum of $1219.00, hereinabove and in finding VIII hereof more particularly described, was paid in full by said drawee thereof and thereafter and on or about May 18, 1931, the net proceeds of said draft, amounting to $1245.11, were received by defendant bank at San Francisco, California.

X.

Included in the drafts set forth in the amended bill of complaint herein is one numbered 103023, in the principal sum of $779.10, drawn by said Richfield Oil Company of California on Sociedad Automoviliaria, which has never been paid by said drawee.

XI.

Included in the drafts set forth in the amended bill of complaint herein is one numbered 13103, in the principal sum of $53.45, drawn by Richfield Oil Company of California on Ito Bergonzali, which has never been paid by said drawee.

XII.

Thereafter and during the month of October, 1930, said Richfield Oil Company of California and said bank made and entered into an agreement that drafts drawn on said bank by said Richfield Oil Company of California and payable to said Richfield Oil Company of California, duly endorsed, which said drafts were termed "banker's acceptances", would be endorsed and accepted for payment by said bank and that such acceptances, to an amount aggregating $155,000.00, would be sold and negotiated by said bank, and that the net proceeds thereof, less discounts, should be credited to the account of said Richfield Oil Company of California at said bank. At said time it was further agreed that such acceptances would be payable ninety days after the date of each thereof and would be based upon and secured only by such drafts of Richfield Oil Company of California drawn upon its responsible foreign customers for shipment of commodities as were slightly greater in amount and of a maturity shorter than the banker's acceptances, for the payment of which, before maturity, such drafts were respectively reserved. [134]

XIII.

At or about the time of the making of said agreement of October, 1930, for the issuance by defendant bank of said banker's acceptances and for the purpose of securing said acceptances to the amount of $150,000.00, said Richfield Oil Com-

pany of California on October 4, 1930, executed and delivered to defendant bank a printed document prepared by defendant bank and designated "acceptance agreement"; on November 28, 1930, a second printed document prepared by defendant bank, in the same form as the first, was executed and delivered by said Richfield Oil Company of California to defendant bank for the purpose of securing additional banker's acceptances aggregating the sum of Five Thousand Dollars ($5,000.00). Said acceptance agreements are marked respectively Plaintiff's Exhibits 16 and 38 and are hereby made a part hereof by reference.

XIV.

Each of the acceptance agreements above referred to was incomplete on its face in that the drafts constituting the security for the issuance of banker's acceptances under each of said agreements were not designated or identified in any manner whatsoever, parol evidence being necesasry to determine what drafts constituted the subject matter of each of said acceptance agreements.

XV.

A certain draft No. 103012, in the principal sum of $2.441.00, drawn by said Richfield Oil Company of California on Buena Y Cia and included in the ancillary amended bill of complaint herein, was deposited with defendant bank by said Richfield Oil Company of California under and pursuant to the terms and conditions of said written acceptance

agreement dated October 4, 1930, but said draft was not included under said oral agreement entered into during the month of August, 1930, between Richfield Oil Company of California and defendant bank.

XVI.

Thereafter and pursuant to said agreement of October, 1930, hereinabove and in finding XII hereof particularly referred to, said bank negotiated and sold said banker's acceptances aggregating the sum of $155,000.00 and deposited the net proceeds thereof to the account of said Richfield Oil Company of California. Said banker's acceptances were secured only by foreign drafts of said Richfield Oil [135] Company of California of an aggregate amount slightly in excess of the amount of said banker's acceptances so issued, and, excepting as to draft No. 103012 hereinabove in finding XV mentioned, having a maturity shorter than the maturity of said banker's acceptances. None of said foreign drafts herein in this finding referred to is involved in or constitutes the subject matter of this litigation. Thereafter and on or about February 26, 1931, the total amount of said banker's acceptances, so negotiated as aforesaid, in the sum of $155,000.00, was fully paid and discharged.

XVII.

Excepting as to said draft No. 103012 hereinabove and in finding XV hereof referred to, only those foreign drafts drawn by Richfield Oil Com-

pany of California, the proceeds of which could be and actually were received by defendant bank at San Francisco at least one day before the maturity date of the acceptances secured thereby, were the subject matter of the acceptance agreement dated October 4, 1930, and the supplemental acceptance agreement dated November 28, 1930; all other foreign drafts drawn by Richfield Oil Company of California, including those set forth in finding VIII hereof, were deposited with defendant bank by said Richfield Oil Company of California for collection only and formed the subject matter of the oral agreement made and entered into between said parties during the month of August, 1930.

XVIII.

At the time of the appointment and qualification of said William C. McDuffie as receiver for Richfield Oil Company of California, to-wit, on January 15, 1931, said Richfield Oil Company of California was indebted to certain banks throughout the United States in an amount of approximately $10,000,000.00, including said defendant bank upon the aforesaid indebtedness of $625,000.00 due upon the above described promissory note dated July 12, 1930; in each of said banks said Richfield Oil Company of California maintained a deposit account which it used in the ordinary course of business.

XIX.

At or about the time of the appointment and qualification of said receiver, it was agreed by and

between said receiver and each of said banks, in-
[136] cluding defendant bank, that each of said banks would forthwith transfer the deposit account so held by it in the name of Richfield Oil Company of California, to that of William C. McDuffie as its receiver, and would carry on and conduct said account in the ordinary course of business and would not exercise any claim of banker's lien upon said account, including collections, except such collections as were security for acceptances theretofore issued by defendant bank; such agreement was made in order to enable said receiver to carry on and transact the affairs of said Richfield Oil Company of California for the benefit of the creditors thereof until the termination of said receivership.

XX.

Thereupon and thereafter all of said banks, pursuant to said agreement, transferred said accounts to the credit of said receiver and all except defendant bank have since continued to carry on and conduct said accounts as the same had been conducted in the ordinary course of business with said Richfield Oil Company of California and have refrained from asserting any banker's lien or right of set-off against said accounts and collections therein.

XXI.

Said Wells Fargo Bank & Union Trust Co., in violation of its said agreement by and with said receiver and with said other banks, has applied

the proceeds of the collection of the four drafts set forth and described in finding VIII hereof, to its preexisting unsecured promissory note, dated July 12, 1930, of approximately $625,000.00; said receiver of Richfield Oil Company of California has heretofore demanded of deefndant bank restoration and repayment to his account of the proceeds of said drafts, but said defendant bank has refused and still refuses so to do.

XXII.

On or about March 30, 1931, defendant bank filed with William C. McDuffie, as receiver for Richfield Oil Company of California, its proof of claim, duly verified, alleging that said Richfield Oil Company of California at that time was indebted to claimant in the sum of $636,189.95, which in the main covered the principal sum of said promissory note dated July 12, 1930, plus accrued interest thereon, and also included two claims for small sums not involved in this [137] litigation. Said verified claim as filed by said bank concluded with the statement "that no securities are held by said claimant for said indebtedness".

Thereafter and on or about the 19th day of May, 1931, after first having obtained leave of Court, defendant filed with said William C. McDuffie as receiver of Richfield Oil Company of California its amendment to Proof of Claim, wherein it was set forth by said defendant that the drafts hereinabove mentioned were held as security for the general

indebtedness of Richfield Oil Company of California to said defendant.

XXIII.

Both prior and subsequent to the date of said receivership, proceeds of foreign drafts drawn by Richfield Oil Company of California and deposited by it with defendant bank for collection only and not as security for acceptances issued by defendant bank, were deposited by defendant bank to the credit of said Richfield Oil Company of California and/or its receiver, without any claim of right of offset or banker's lien on the part of said defendant bank.

XXIV.

None of the drafts more particularly set forth in finding VIII hereof, the proceeds of which are the subject matter of this action were deposited by said Richfield Oil Company of California with defendant bank under or by virtue of the terms or provisions of said written contract designated "acceptance agreement", dated October 4, 1930, executed by said Richfield Oil Company of California and addressed to defendant bank, nor were any of said drafts deposited by said Richfield Oil Company of California with defendant bank under or by virtue of the terms or provisions of said supplemental acceptance agreement entered into between said parties and dated November 28, 1930; nor were any of said drafts subject to or controlled by any of the terms or provisions of either of said acceptance agreements.

CONCLUSIONS OF LAW.

I.

The above entitled court has jurisdiction of the subject matter of and the parties to the above entitled action.

II.

Defendant bank has never at any time acquired a valid lien against any of [138] the drafts set forth and described in finding VIII of the findings of fact herein, or the proceeds of any of said drafts.

III.

By said oral agreement and understanding entered into between said Richfield Oil Company of California and defendant bank during the month of August, 1930, said defendant bank did waive any and all of its lien rights, statutory or otherwise, with respect to the drafts set forth and more particularly described in finding VIII of the findings of fact herein, and the proceeds of each thereof, and it did not thereafter by any act acquire any such lien right theretofore waived, or otherwise.

IV.

Defendant bank by its said oral agreement entered into with said Richfield Oil Company of California during the month of August, 1930, and by its conduct both prior and subsequent to the deposit of said foreign drafts set forth and described in finding VIII of the findings of fact herein, the net proceeds of which are now the subject matter of

this litigation, did waive its right of offset or banker's lien respecting all of said drafts and did further waive its right to apply the proceeds of said drafts or any thereof toward said or any indebtedness of said Richfield Oil Company of California to it.

V.

Drafts numbered 103005, 103006B, 13107 and 123014, hereinabove particularly described in finding VIII of the findings of fact herein, were not deposited in the ordinary course of business by said Richfield Oil Company of California with defendant bank, but were deposited with said bank under a special agreement and for a special purpose, and constituted a specific deposit or trust.

VI.

Defendant bank, by its said oral agreement entered into with Richfield Oil Company of California during the month of August, 1930, and by its subsequent acts and course of conduct, dealt with said Richfield Oil Company of California and its receiver under circumstances inconsistent with the exercise by it of a right of set-off or banker's lien, with respect to said drafts described in finding VIII of the findings of fact herein or their proceeds, or any thereof. [139]

VII.

Defendant bank is entitled to retain the sum of $469.06, representing the net proceeds of draft

No. 103012, which was in the principal sum of $2,441.00, drawn by said Richfield Oil Company of California on Buena Y Cia and complainant William C. McDuffie, as ancillary receiver for Richfield Oil Company of California, has no right, title or interest in or to the same or any part thereof.

VIII.

Complainant William C. McDuffie, as ancillary receiver for said Richfield Oil Company of California, is the true owner of the net proceeds of said drafts numbered 103005, 103006B, 13107 and 123014, more particularly described in finding VIII of the findings of fact herein, aggregating the sum of $144,289.73, and defendant Wells Fargo Bank & Union Trust Co. has no right, title or interest in or to the same or any part thereof.

IX.

Complainant William C. McDuffie, as ancillary receiver of Richfield Oil Company of California, a corporation, is entitled to a judgment and decree herein for the sum of $144,289.73, representing the net proceeds of drafts numbered 103005, 103006B, 13107 and 123014, more particularly described in finding VIII of the findings of fact herein, together with interest on the net proceeds of each of said drafts, at the rate of seven per cent per annum, from the date the net proceeds of each of said drafts were received by defendant bank at San Francisco, California, all as set forth in finding IX of the findings of fact herein, which said interest to

date amounts to the sum of Nineteen Thousand and Sixteen and 12/100 Dollars ($19,016.12), together with said complainant's costs of suit herein.

Let judgment and the decree of this court be entered accordingly.

Dated: May 12th, 1933.

FRANK H. NORCROSS

Judge.

Approved as to form as provided in Rule 22:

.....

Solicitors for Defendant Wells Fargo Bank & Union Trust Co.

[Endorsed]: Filed May 13th 1933 [140]

In the District Court of the United States, Northern District of California, Southern Division.

No. 2758-K

In Equity.

THE REPUBLIC SUPPLY COMPANY OF CALIFORNIA, a corporation,

Complainant,

vs.

RICHFIELD OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

WILLIAM C. McDUFFIE, as ancillary receiver of Richfield Oil Company of California, a corporation,

Complainant,

vs.

WELLS FARGO BANK & UNION TRUST CO., a corporation,

Defendant.

DECREE

This cause came on to be heard on July 6, 1932, and thereafter was argued by counsel; and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED as follows, viz:

That defendant Wells Fargo Bank & Union Trust Co. be and it is hereby ordered, directed and required to pay over forthwith to complainant

William C. McDuffie, as ancillary receiver of Richfield Oil Company of California, the sum of One Hundred Sixty-Three Thousand Three Hundred Five and 85/100 Dollars ($163,305.85), in lawful money of the United States of America, representing the net proceeds of four certain drafts numbered 103005, 103006B, 13107 and 123014, amounting to the sum of One Hundred Forty-four Thousand Two Hundred Eighty-nine and 73/100 Dollars ($144,289.73), collected by defendant bank for the account of said complainant, together [141] with interest on the net proceeds of each of said drafts, at the rate of seven per cent (7%) per annum, computed from the respective dates the net proceeds of each thereof were received by defendant bank at San Francisco, California, which said interest in the aggregate to date amounts to the sum of Nineteen Thousand Sixteen and 12/100 Dollars ($19,016.12), together with complainant's costs of suit herein amounting to the sum of

Dollars ($).

Dated: May 12, 1933.

FRANK H. NORCROSS,
District Judge.

Approved as to form as provided in Rule 22:
HELLER, EHRMAN, WHITE & McAULIFFE
Solicitors for Defendant Wells Fargo Bank & Union Trust Co.

[Endorsed]: Filed and entered May 13th, 1933. [142]

[Title of Court and Cause.]

ENGROSSED STATEMENT OF EVIDENCE REQUIRED BY EQUITY RULE 75.

BE IT REMEMBERED That the above entitled cause came on regularly for trial before the above entitled Court sitting in equity on the 6th day of July, 1932, upon the issues formed by the ancillary amended bill of complaint and the answer thereto, [143] Theodore J. Roche, Esq. and Messrs. Gregory, Hunt and Melvin, by T. T. C. Gregory, Esq. and Ward Sullivan, Esq. appearing as counsel for complainant, and Messrs. Heller, Ehrman, White & McAuliffe, by Lloyd W. Dinkelspiel, Esq. appearing as counsel for defendant. Counsel for both parties stipulated that a trial by jury be waived.

COMPLAINANT'S CASE.

Complainant offered in evidence a copy of the bill of complaint filed in the case of Republic Supply Company of California, a corporation, v. Richfield Oil Company of California, a corporation, filed with the Clerk of the United States District Court in and for the Southern District of California, on January 15, 1931; a copy of the answer filed in said case by the Richfield Oil Company of California; a copy of the Order appointing William C. McDuffie as receiver of Richfield Oil Company of California; a copy of the bill of complaint filed in

the District Court of the United States, Northern District of California, Southern Division, in the case of Republic Supply Company, a corporation, versus Richfield Oil Company of California, a corporation; a copy of the answer filed in that case by Richfield Oil Company of California, a corporation; a copy of the Order made by said Court appointing William C. McDuffie as ancillary receiver of Richfield Oil Company of California; and the oath of office taken by said William C. McDuffie. These documents were received in evidence and stipulation was made that they should be deemed to have been read in evidence without the necessity of marking them as exhibits. Said documents were the pleadings and the Orders in the case in which petition was made for the appointment of a receiver and an ancillary receiver for Richfield Oil Company of California, consent to which appointments was made in said answers and the appointments made by the Court in said Orders. It was stipulated between counsel that a copy of said Order appointing William C. McDuffie receiver of [144] Richfield Oil Company of California was sent to defendant, Wells Fargo Bank & Union Trust Co., on January 15, 1931, and was received by said bank on January 16, 1931, and further that at the request of said Wells Fargo Bank & Union Trust Co. an additional certified copy of said Order was sent it a day or so later.

WILLIAM C. McDUFFIE

was then called as a witness by the complainant and testified as follows:

Direct Examination:

I reside at Pasadena, California, and have resided there for about ten or eleven years. My occupation is that of receiver of Richfield Oil Company of California, and I have been such receiver since the 15th of January, 1931. During the period from the 24th day of December, 1930, until the 15th day of January, 1931, I was president of the Richfield Oil Company of California. Prior to the 24th day of December, 1930, I was president of Pacific Western Oil Company and had no connection with Richfield Oil Company of California. During the latter part of 1930, and the first six weeks of 1931, the offices of the Richfield Oil Company were at 555 South Flower Street, Los Angeles. The Richfield Oil Company prior to the time that I was appointed receiver was engaged in all phases of the oil business; producing, piping oil, the finding of oil, retail sales, wholesale sales, of all products; and this business continued after I became receiver. At the time I became receiver of the Richfield Oil Company it had what is known as an export or foreign department, the manager of which was Mr. Hall. Mr. Hall had been manager during the time that I was president of Richfield Oil Company and before my appointment as its receiver, and he continued as such during the greater part of 1931. At the time that I became

(Testimony of William C. McDuffie.)

receiver of Richfield Oil Company it was exporting its commodities and products and had been doing so during the time that I acted as its president and before that time to my knowledge. During this period of time, Richfield Oil Company had customers in foreign countries to which its goods and commodities were sold and shipped, [145] and that situation continued after I was appointed receiver, and has continued down to the present time. At the time of my appointment as receiver, I wrote a letter to Wells Fargo Bank & Union Trust Co., in which it was stated that a copy of the Order appointing me as receiver was being sent, but I do not know that it was attached to the letter at the time I signed it.

A letter was introduced in evidence by complainant and was received in evidence and marked Plaintiff's Exhibit 1. Said letter was written on the letterhead of Richfield Oil Company of California and was dated Los Angeles, January 15, 1931, and was addressed to Wells Fargo Bank & Union Trust Co., Market and Montgomery Streets, San Francisco, California, and was in the words and figures following, to-wit:

> "I was this morning, by order of the United States District Court of California, appointed receiver of Richfield Oil Company of California, a Delaware corporation, and am enclosing herewith a copy of said order.

(Testimony of William C. McDuffie.)

It is my desire to open an account with your bank to be entitled 'Richfield Oil Company of California, William C. McDuffie, Receiver', and to authorize the following persons to sign checks drawn on the account in the manner hereinafter specified.

(Then followed names of the parties.)

In opening the account of Richfield Oil Company of California, William C. McDuffie, Receiver, please transfer the balance appearing to the credit of the Richfield Oil Company of California at the close of business January 14, 1931, to the credit of the account 'Richfield Oil Company of California, William C. McDuffie, Receiver', and forward closing statement together with all cancelled checks for the account of the Richfield Oil Company of California, to me at the address mentioned in the preceding paragraph. Please confirm, by wire, the amount of balance transferred.

Yours very truly,

WILLIAM C. McDUFFIE."

Said witness testified further as follows:

I had had no business with the Wells Fargo Bank & Union Trust Co. immediately prior to my appointment as receiver. The Richfield Oil Company had had some business relations with the Wells Fargo Bank & Union Trust Co. to my knowledge. [146]

(Testimony of William C. McDuffie.)

On January 14, 1931, immediately prior to the date of my appointment as receiver, a meeting was held in my office in the Richfield Oil Company's building at Los Angeles, attended by the bankers interested in the Richfield Oil Company.

At this meeting Security First National Bank of Los Angeles was represented by Mr. Hardacre and Mr. Rude; the Bank of America was represented by Mr. Nolan; the California Bank by Mr. Page; Citizens National Bank of Los Angeles was represented by Mr. Herbert Ivey and Mr. L. O. Ivey; the Chemical Bank of New York was represented by Mr. Darling. There was a Chicago bank represented by Mr. Buchanan and I don't know whether he represented the Continental or another Chicago bank; the American Trust Company was repreпresented by Mr. Hill. I do not think the First Seattle Dexter-Horton National Bank was represented.

> (The foregoing testimony, commencing with the words, "At this meeting" was objected to by counsel for defendant on the ground that it was incompetent, irrelevant and immaterial and not binding on defendant. Objection was overruled and exception noted.)

Prior to the date of my appointment as receiver, Richfield Oil Company of California was indebted to banks in California and elsewhere in a total amount of slightly in excess of Ten Million Dollars. This indebtedness was unsecured.

(Testimony of William C. McDuffie.)

(It was here stipulated between counsel that the statement that the total indebtedness was unsecured should not be taken as a concession as against defendant of its contention that the indebtedness of Richfield Oil Company to it was secured by certain foreign drafts and the collections thereof as claimed in this action.)

At the time that I was appointed receiver, there was an outstanding indebtedness due from Richfield Oil Company to Wells Fargo Bank & Union Trust Co. My remembrance was that it was Six [147] Hundred and Fifty Thousand Dollars. To my knowledge this indebtedness was not secured aside from the claim here made by the defendant bank. The Ten Million Dollar indebtedness to which I have referred includes the Six Hundred and Twenty-five Thousand Dollars due to Wells Fargo Bank & Union Trust Co. Richfield Oil Company was indebted likewise to a large number of creditors located in different parts of the United States, and all of this indebtedness was unsecured. A large number of said creditors were at that time pressing their claims against the company.

On January 16th, after my appointment as receiver, another meeting of the representatives of these banks was held in my office in Los Angeles in the Richfield Building, called at my request. I called the meeting because I had been advised that certain of the banks had seized balances of Richfield Oil Company. I told the bankers at this meet-

(Testimony of William C. McDuffie.)

ing that conditions were such that if they felt it was necessary to seize these balances that I, as receiver, could not carry on and that the receivership must be immediately terminated, and that it would be necessary to immediately go into bankruptcy. I told them that it was not only necessary that I have the balances restored but that I have their assurance that the normal flow of business would be allowed to go on; collections were coming in, of course; that if they merely restored my balances it would be obvious that it would be impossible to carry on business if collections were seized. I asked them if they would not restore to me all funds that might be available. I particularly brought that to their attention, that, after all, the receivership was created to protect the estate and to carry it on, and that without funds it was utterly impossible to carry on the estate.

(The foregoing testimony commencing with the words "After my appointment as receiver" was objected to by counsel for defendant on the ground that it was incompetent, irrelevant and immaterial, hearsay and not binding on defendant and an attempt to assert the rights of persons not parties to this action. Objection was overruled and exception noted. It was here stipulated that counsel for defend- [148] ant might cross-examine the witness on this testimony without waiving the objection and that

(Testimony of William C. McDuffie.)

the objection would run to the whole line of testimony in this respect.)

At that time I knew that some foreign drafts were on deposit with some of the other banks, but I did not know exactly with what banks they were.

(Counsel for defendant objected to the last testimony on the same grounds urged in the previous objection. Objection was overruled and exception noted.)

At this meeting there was no representative present from Wells Fargo Bank & Union Trust Co.

At that time I had been acquainted with Mr. Eisenbach of the Wells Fargo Bank & Union Trust Co. for a year at least, and before I was connected with Richfield he had spoken to me about Richfield and to my knowledge he had from time to time made investigations respecting the affairs of Richfield Oil Company and its general condition.

The banks represented at the meeting agreed that they would not exercise their right of set-off upon the Richfield Oil Company balances, and all those who had already exercised the right of set-off agreed that they would restore the balances, provided all of the banks did so. At this meeting it was said that it was necessary to get the consent of the Wells Fargo Bank as well as the other out-of-town banks.

(The foregoing testimony was objected to by counsel for defendant on the same grounds as

(Testimony of William C. McDuffie.)

were urged with respect to the last objection. Objection overruled and exception noted.)

At the conclusion of that meeting a telegram was prepared after discussions between Mr. Hardacre and the others present, and a copy of said telegram was transmitted to each one of the out-of-town banks including the Wells Fargo Bank & Union Trust Co.

A copy of this telegram was introduced in evidence by complainant and was received in evidence and marked Plaintiff's [149] Exhibit 2. Said telegram was in the words and figures as follows:

"Los Angeles California 1230P Jan 16th 1931
Julian Eisenbach
VP WFBAUTC Sanfrancisco Calif
As receiver I am ordered by Federal Court to take over all assets including cash in banks stop while you have undoubtedy right of offset, such right if exercised will seriously cripple receivers operations. It is necessary therefore to request that all banks restore to receiver full cash balance stop Please therefore transfer such funds to a new account on your books in my name as receiver evidence of my authority and signature cards will follow by mail stop Local banks have indicated they will acquiesce in this program.

Wm C McDuffie Receiver of
Richfield Oil Co of California"

(Testimony of William C. McDuffie.)

Said witness testified further as follows:

Prior to the transmission of this telegram I had not been advised by the Wells Fargo Bank that they had intended to exercisce a right of set-off against any of the funds in their possession. After sending the telegram marked Plaintiff's Exhibit 2 to the Wells Fargo Bank I received an answer.

A telegram was introduced in evidence by complainant and was received in evidence and marked Plaintiff's Exhibit 3. Said telegram was in words and figures as follows:

"Sanfrancisco Calif 16 1931 Jan 16PM 6 00
W C McDuffie
Receiver Richfield Oil Co of California Richfield Bldg
555 South Flower St
Losangeles Calif.
Replying telegram we are willing to restore into your name as receiver Richfields balance in checking account provided we are notified by you that all companys banks have taken similar action stop We are holding certain collections as security for acceptances please understand that we continue to reserve all our rights for bankers lien against these collections
Julian Eisenbach Vice President Wells Fargo Bank & Union Trust Co."

Said witness testified further as follows:

I received an answer to each one of the wires

(Testimony of William C. McDuffie.)
which I [150] sent to all of the banks and each of them responded that they would restore the funds where the funds had been set off and would refrain from exercising any right of set-off which they might have, provided all the other banks did likewise. I received a wire from Percy H. Johnston, president of the Chemical Bank, New York. After receipt of this telegram the Chemical Bank restored the cash balances of Richfield and whatever other credits were in the bank. I also received from Jerre L. Dowling, a representative of the Chemical Bank, a telegram addressed to him signed P. H. J., said P. H. J. being P. H. Johnston.

Said telegrams were introduced in evidence by complainant and were received in evidence and marked Plaintiff's Exhibit 4. Said telegrams were in words and figures following:

"Newyork NY 16 5200P 1931 Jan 16 PM 2 42
Wm C McDuffie, Receiver
For Richfield Oil Co of California
Companys balances have been applied to indebtedness we do not propose to restore it
Percy H. Johnston President Chemical Bank and Trust Co."

(Objection to the introduction of said telegram was made by counsel for defendant on the gorund that it was incompetent, irrelevant and immaterial and not binding on defendant. Objection was overruled and exception noted. It was here stipulated that this objection would run to all the telegrams from other banks to W. C. McDuffie hereinafter

(Testimony of William C. McDuffie.)

set forth, without the necessity of repeating the objection.)

"New York NY 17 1931 Jan 17 AM 10 52

Jerre L. Dowling

Care Biltmore Hotel

Losangeles Calif

If in your judgment best for us restore Richfield balance you are authorized to make statement we will do so stop You are on the ground and should be better able to appraise than ourselves stop Noyes making strong effort to name this bank as bond depositary.

P. H. J." [151]

(It was stipulated that with reference to the following telegrams to be introduced, if they were signed by a representative of the banking interests, they would be considered telegrams of the banks.)

Complainant then introduced in evidence a telegram which was received in evidence and marked Plaintiff's Exhibit 5. Said telegram was addressed to James L. Buchanan, Hollywood, California, dated January 16, 1931, and was in words and figures as follows:

"Continental and we will replace balances as soon as we learn that Los Angeles and all other banks will do the same thing. As receiver has no jurisdiction in Illinois prefer not to place this to his credit until we have full authority

(Testimony of William C. McDuffie.)

from the company mailing you signature cards today.

A. W. Newton."

Said witness testified further as follows:

A. W. Newton represented the First National Bank of Chicago. Both the First National and the Continental restored the cash balances and the credits to the credit of the Richfield Oil Company.

Complainant then offered in evidence a telegram which was received in evidence and marked Plaintiff's Exhibit 6. Said telegram was addressed to W. C. McDuffie and dated January 22, 1931, and was sent by W. H. Parson, Chairman First Seattle Dexter-Horton National Bank. Said telegram was in the words and figures following:

> "This is to inform you that it will be agreeable with us to release funds that were on deposit with us by Richfield Oil Company and credit same back to the account of receiver of Richfield Oil Company on receipt of advice from you that all other bank creditors are doing likewise."

Complainant than offered in evidence a telegram which was received in evidence and marked Plaintiff's Exhibit 7. Said tele- [152] gram was dated January 17, 1931, was addressed to W. C. McDuffie as receiver of Richfield Oil Company, and was signed James K. Lochead, Vice President American Trust Company. Said telegram was as follows:

(Testimony of William C. McDuffie.)

"Agreeable to your request 16th will transfer Richfield balances your account as receiver."

Complainant then introduced in evidence a telegram which was received in evidence, marked Plaintiff's Exhibit 8. Said telegram was dated January 23, 1931, was signed by C. K. Grensted, Los Angeles Main Office, Bank of America, and addressed to W. C. McDuffie as receiver of Richfield Oil Company. Said telegram was as follows:

"Balance of Richfield Oil Co. three thousand six hundred fifty dollars and one cent stop Richfield Oil expense account two hundred thirty five dollars sixty five cents stop Richfield Oil Special Account eight thousand five hundred fifteen dollars and sixty five cents stop Transferred to Richfield Oil Co of California Wm C. McDuffie receiver stop Expense Account stop and Payroll Account respectively."

Complainant then offered in evidence a telegram and the same was received in evidence and marked Plaintiff's Exhibit 9. Said telegram was sent by the Security First National Bank of Los Angeles to W. C. McDuffie and was dated January 24, 1931. Said telegram was as follows:

"We credit today your receiver account thirty seven thousand nine hundred six dollars six cents balance remaining in Richfield Oil Co. account and seven thousand ninety five dollars ninety nine cents balance remaining in Rich-

(Testimony of William C. McDuffie.)

field Oil Co. executive payroll account stop Letter of confirmation follows."

Complainant then offered in evidence a letter which was received in evidence and marked Plaintiff's Exhibit 10. Said letter was dated January 19, 1931, and was sent by Mr. Hardacre, Vice President Security First National Bank of Los Angeles. Said letter reads as follows: [153]

"Dear Mr. McDuffie:

Referring to your circular telegram of January 16th, I think from our conversations you understand that this bank is willing to transfer to you as Receiver balances at credit of the Richfield Oil Company, provided all other banks in which Richfield has balances are willing to do the same thing.

I am writing this as a matter of record so you will have a complete file on the subject, because no doubt when you have a consent of all of the banks to this agreement they will individually desire to have some evidence of the unanimity of thought in this connection before they actually make the transfers to you.

We have had a number of checks deposited by the Richfield Company returned and there may be a few more yet to come. At the moment it appears we shall have a balance of about $40,000.00 to turn over to you when the unanimous consent has been secured.

Yours very truly,

A. B. Hardacre, Vice-President."

(Testimony of William C. McDuffie.)

Said witness further testified as follows:

At the date of said letter marked Plaintiff's Exhibit 10, the Security First National Bank of Los Angeles had with it on deposit for collection, drafts exceeding the value of $300,000 and said sum represented collections upon drafts in the bank's possession prior to the 15th day of January, 1931. Said sum was afterwards turned over to Richfield Oil Company.

In each case in which a bank had already exercised its so-called bankers lien or right of set-off, the balances were restored, and after the passage of these telegrams none of the banks exercised its bankers lien, not referring, however, to the action taken by the Wells Fargo Bank during the month of May, 1931.

> (It was stipulated that the foregoing testimony commencing with the words "at the date of said letter" should be subject to the same objections previously urged to this line of testimony.)

Complainant then offered in evidence a photostatic copy of a telegram and the same was received in evidence and marked Plaintiff's Exhibit 11. Said telegram was dated January 23, 1931, was signed James R. Page, President, California Bank, and addressed to Wm. C. McDuffie. Said telegram reads as follows: [154]

> "Wishing to be helpful to the company and yourself the California Bank will accede to

(Testimony of William C. McDuffie.)

your request stated in your telegram of January sixteenth subject to the other major bank creditors doing the same."

Said witness testified further as follows:

Prior to the time of my receivership and during the time of my receivership, the Richfield Oil Company sold goods and commodities throughout the United States and in other places, and it was the habit and custom of the Richfield Oil Company to take and accept checks drawn upon banks in foreign jurisdictions representing the purchase price of these commodities. The Richfield Oil Company almost continuously had in its possession, checks drawn upon banks which were located in different jurisdictions, and this was part of the usual and customary flow of its business. These checks would be put in various banks for collection, and they would have to be sent to the bank upon which they were drawn for payment. Practically about every day there would be a large amount of money in transit between the banks, which money belonged to the Richfield Oil Company. Not only were the cash balances restored where right of set-off had been exercised, but likewise all subsequent collections were deposited to the credit of the Richfield Oil Company by the banks. Outside of the moneys here involved, upon which the Wells Fargo Bank & Union Trust Co. claims this right to exercise a bankers lien and right of set-off, no bank actually

(Testimony of William C. McDuffie.)
did exercise a bankers lien or right of set-off as against any funds or collections.

(The foregoing testimony commencing with the words "Not only were the cash balances" was objected to by counsel for defendant on the ground it was incompetent, irrelevant and immaterial and not binding on defendant. Objection was overruled and exception noted.)

The witness then testified from a memorandum prepared by himself as follows:

This is a statement of the outstanding unsecured debts of the Richfield Oil Company of California to various banks. The Bank of America of California, at Los Angeles, $2,060,000. California Bank, Los Angeles, $250,000. Chemical Bank & Trust Company, New York, [155] $625,000. Citizens National Trust & Savings Bank of Los Angeles, $625,000. Continental Illinois Bank & Trust Company, Chicago, $625,000. First National Bank, Chicago, $500,000. First Seattle Dexter-Horton National Bank, Seattle, $250,000. Wells Fargo Bank & Union Trust Co., San Francisco, $625,000. Security First National Bank of Los Angeles, $2,-210,000. Tucker, Hunter Dulin & Co., through the American Trust Company, San Francisco, $1,350,-000. Tucker, Hunter Dulin & Co., Los Angeles, $1,000,000. Manufacturers Trust Company of New York, $150,000. That makes a grand total of $10,-270,000.

(Testimony of William C. McDuffie.)

(The foregoing testimony commencing with the words "This is a statement" was objected to by counsel for defendant on the ground it was incompetent, irrelevant and immaterial and not binding on defendant. Objection was overruled and exception noted.)

Complainant introduced in evidence a letter and the same was received in evidence and marked Plaintiff's Exhibit 12. Said letter was dated January 17, 1931, and was written by J. Eisenbach, Vice President of the Wells Fargo Bank & Union Trust Co. to Wm. C. McDuffie as receiver of Richfield Oil Company. Said letter reads as follows:

"We are today in receipt of your registered letter dated January 15, in reference to account which you have asked us to open on our books to be entitled 'Richfield Oil Company of California, William C. McDuffie, Receiver'.

In this connection, we call your attention to the fact that we have not received your reply to our telegram of January 16 as follows:

'Replying telegram we are willing to restore into your name as Receiver Richfield's balance in checking account provided we are notified by you that all company's banks have taken similar action stop We are holding certain collections as security for acceptances Please understand that we continue to reserve all our

(Testimony of William C. McDuffie.)

rights for bankers lien against the collections.'

Pending notification by you that all of the Company's banks have restored to the Receiver the Company's cash balances, we have taken no action towards such restoration on our part. We have, however, opened the account of Richfield Oil Company of California, William C. McDuffie, Receiver, by crediting to same such deposits as have reached us subsequent to notification of your appointment. For your guidance, we enclose statement of this account as of the close of business tonight. A closing statement of the Richfield Oil Company of [156] California, with cancelled vouchers goes forward today under separate cover.

We also enclose cards for specimen signatures in duplicate.

Yours very truly,

J. Eisenbach, Vice President."

Complainant then offered in evidence a telegram dated January 22, 1931, signed by Wm. C. McDuffie as receiver of Richfield Oil Company of California, and addressed to Julian Eisenbach, Vice President, Wells Fargo Bank & Union Trust Co. Said telegram was received in evidence and marked Plaintiff's Exhibit 13, and reads as follows:

"All banks have now expressed their willingness to replace Richfield Oil Company's offset

(Testimony of William C. McDuffie.)

balances of January 15th to credit of receiver stop Will therefore greatly appreciate your at once transferring such sums to my credit advising me the amount by wire collect stop Wish express appreciation your cooperation as these funds will be of great assistance."

Complainant then offered in evidence a photostatic copy of a telegram which was received in evidence and marked Plaintiff's Exhibit 14. Said telegram was dated January 23, 1931, signed by Julian Eisenbach, Vice President, Wells Fargo Bank & Union Trust Co., addressed to Wm. C. McDuffie. Said telegram reads as follows:

"Answering wire have today placed to your credit Richfield Oil Companys offset balance of January fifteenth amount forty thousand eight hundred seventy four dollars seventy seven cents."

Complainant then offered in evidence the carbon copy of a letter addressed by the Richfield Oil Company, William C. McDuffie, Receiver, to the Wells Fargo Bank & Union Trust Co., dated January 24, 1931, and the reply to said letter, signed by Julian Eisenbach, dated January 26, 1931. Said letters were received in evidence and marked Plaintiff's Exhibit 15. The letter addressed to the Wells Fargo Bank & Union Trust Co. reads as follows: [157]

"In connection with our recent request to transfer balance in name of Richfield Oil Company of California to a new account, Richfield Oil Company of California—William C. McDuffie, Receiver, it will be appreciated if you will forward us promptly your usual form of Debit Advice closing out the old account, and a copy of your Deposit Slip or other form opening up the new account.

While in some instances we have received Bank statements showing the old account closed out, our Attorneys advise that the documents requested herein are necessary to comply with legal requirements."

The answer reads as follows:

"William C. McDuffie, Receiver,
Richfield Oil Company of California,
555 South Flower Street,
Los Angeles, California.
Dear Sir:

In accordance with your letter of January 24, we enclose statement of the account of the Richfield Oil Company of California, showing restoration of balance which was applied under our Banker's Lien and the subsequent transfer of this restored balance to the new account of Richfield Oil Company of California, William C. McDuffie, Receiver.

We also enclose copies of our debit and credit slips covering these entries.

(Testimony of William C. McDuffie.)

Trusting that the above meets with your requirements, we are,

Yours very truly,

J. Eisenbach, Vice President."

Said witness further testified as follows:

At the meeting of the bankers on January 16th, the situation I presented to them was an emergency situation. I explained to them that it was necessary for me as receiver to continue to carry the business forward. I explained as thoroughly as I possibly could that it must be obvious to them that such a business as Richfield's was dependent upon the receiver having available all possible funds, that is, all assets of every character, so that the receiver might endeavor to continue the business in some operating form, and that without funds it was utterly impossible. Payroll checks had to be met and public utility charges had to be met once a month. Freight had to be met as it was incurred. A very large amount of the business of Richfield Oil Company was being done on credit. [158]

(The foregoing testimony commencing with the words "At the meeting of the bankers" was objected to by counsel for defendant on the ground it was incompetent, irrelevant and immaterial and not binding on defendant. Objection overruled and exception noted.)

Early in May, 1931, I was advised that Wells Fargo Bank & Union Trust Co. had exercised or

(Testimony of William C. McDuffie.)

was undertaking to exercise a banker's lien or a right of set-off against the two 180 day Birla Bros. drafts deposited with the bank and payable in May of that same year, and likewise another draft for $23,000—a 180 day draft drawn upon Birla Bros., due in August. After receiving that information, I had a conversation with Mr. Eisenbach over the long distance telephone. I protested any action of this character on the part of his bank and told him that I considered it an absolute violation of the agreement that had been entered into between the banks, and a violation of his own agreement as represented by his telegram; that an emergency of the gravest character faced the company in the sense that taxes had to be met,—property taxes; that I felt that we would have to hold the bank responsible if we possibly could, if they took any such action; that I felt that he, himself, was in touch with the situation, knew what the situation was, knew how very greatly the receiver was constantly in need of funds, and that I thought that such action on the part of his bank was detrimental to the conduct of the business and detrimental to the whole spirit of the agreement under which the receivership was being carried on for the creditors. I told him that I felt this action on his part was a violation of the agreement between all banks. Mr. Eisenbach told me that this action was taken by his bank on direct instructions from Mr. Lipman, and there was nothing that he could do about it. That is the substance of his conversation.

(Testimony of William C. McDuffie.)

Cross-Examination.

The date of this conversation with Mr. Eisenbach was May 11th. I have no record or memorandum of that conversation. I am testifying as to the best of my recollection as to what was said on that occasion. My recollection is rather clear because the matter [159] was of extraordinary importance. It was a matter of considerable surprise to me that the bank would exercise its lien. I don't recall stating in that conversation, "I do not think it is playing cricket at this stage of the game." That is a phrase which I use occasionally. I am not positive that I did not say that. I think it is quite probable that I referred to Mr. Eisenbach's telegram of January 14th and that I stated that I knew he had reserved a right against certain drafts. I cannot say definitely, but inasmuch as I referred to the telegram I imagine that I might have emphasized the word "certain". My understanding of the telegram was that they were reserving rights against certain specified drafts. It was my understanding that they were reserving their rights on drafts of rather short life, the Birla Bros. drafts. I do not know the exact drafts when I used the words, "Certain drafts". I did not know in detail what drafts were referred to.

Although I cannot possibly recall the exact words, my statement to Mr. Eisenbach was something along these lines: "I am surprised at what Wells Fargo Bank did, it is crippling us. It is not fair to us; it

(Testimony of William C. McDuffie.)

is not playing cricket. I know you reserved your rights to do this, but I am asking you not to do it. It is not helping us along." In substance, I stated to Mr. Eisenbach that I knew there had been a reservation of rights, but I had not expected the bank to exercise these rights. I did not have the faintest idea the bank would reserve any rights against anything except the acceptances; otherwise I should have taken the collection out of their hands long before that.

The agreement between the banks as I understood it was that our funds of all character would be available to the receiver. This agreement was never made in written form except by an exchange of telegrams. There was nothing else in writing. The whole agreement is not necessarily set forth in my telegram to the bank and their reply. This telegram marked Plaintiff's Exhibit No. 2 sets forth my proposal to the banks. I saw the words "checking account" on the [160] defendant's reply telegram marked Plaintiff's Exhibit No. 3. A checking account is an account to check against and is not one involving foreign collections according to my understanding. My agreement with the banks is represented here by these telegrams marked Plaintiff's Exhibit No. 2 and Plaintiff's Exhibits Nos. 3 to 11, so far as the writing is concerned. I ultimately replied to the letter and telegram of the Wells Fargo Bank by Plaintiff's Exhibit No. 13, sending the same in response to the request of the

(Testimony of William C. McDuffie.)

Wells Fargo Bank, repeated twice, that I tell them whether other banks had agreed to restore these balances. By the use of the words, "All banks have now expressed their willingness to replace Richfield Oil Company's offset balances of January 15th to credit of receiver", I meant the balances of January 15th. I did not refer to collections in foreign countries that were not payable for many days thereafter. I received a letter from Wells Fargo Bank stating that it had transferred the balance to my account as receiver. I don't know exactly what constituted the deposits in the banks. So far as I know they made available all funds that they had in their keeping. I stated that all the banks restored the cash balances and the credits to the credit of the Richfield Oil Company. By credits, I mean any and everything in the form of funds, including funds that were in transit as well as funds that were actually in the account. So far as I know, the Wells Fargo Bank made available to the receiver all funds that were then in the bank. I have no doubt of this. So far as I understand it, the banks seized the balances that were in the bank as of a morning. I understood that they restored a particular amount that they had taken on that particular morning. I recall having told the local banks that the Wells Fargo Bank made a reservation in its acceptance of my request. My remembrance is that I read the telegram of the Wells [161] Fargo Bank to all the local banks after it

(Testimony of William C. McDuffie.)

was received. I make that statement notwithstanding Mr. Nolan's testimony of yesterday that he does not recall having seen or heard of that telegram. Mr. Nolan usually represented his bank. If he did not then it was Mr. Philio. I positively state that I read that telegram over the telephone to several of the banks. I did not ask Wells Fargo Bank for any explanation as to what it was doing by its reservation in the telegram to me. It is my best recollection that I did not take the telegram up with my counsel.

I did not know exactly what was in the possession of the Wells Fargo Bank. My understanding was that there were a large number of drafts for collection. No doubt I did not know in detail the terms under which those drafts were with the Wells Fargo Bank. I did not know in detail the form of the acceptance agreement that was outstanding. I knew we had an agreement with them whereby money had been raised on these drafts and the drafts were up as collateral. I did not know at that time that that agreement provided: "All bills of lading, warehouse receipts and other documents of title and all money and goods held by you as security for every acceptance shall also be held by you as security for any other liability from us to you, whether then existing or thereafter contracted." I did not know the exact amount of the advances that were outstanding on bankers acceptances. I do not know the amount now, and I did not know it on the day

(Testimony of William C. McDuffie.)

I was appointed receiver. I did not know it on the day I was addressing the bankers at the meeting in Los Angeles. I did not discuss it at that meeting. I did not discuss the collections that the Wells Fargo Bank had at that meeting or at any of the meetings prior to sending the telegram. I did not include it in my telegram. When the answer of the Wells Fargo Bank came back, I understood that they were reserving a perfectly natural right to collect against those acceptances and that they were reserving their rights as against such drafts as might have been earmarked. I under- [162] stood that specified drafts had been earmarked. I was advised of this by the accounting department of the Richfield Oil Company. Prior to my appointment as receiver, I had not discussed this Wells Fargo item in detail. I only knew generally that these four drafts, the major portion of them, were in the Wells Fargo Bank for collection and that the company had endeavored to raise money in every way they could, against everything they could. When I received this telegram marked Plaintiff's Exhibit No. 3, I did not take up with our accounting department as to what this reservation would mean. I did not make any investigation in detail of what the situation was with reference to the drafts in the possession of the Wells Fargo Bank. I did not tell any of the other bankers about it. I am unable to name any banker who asked me any question about that reservation. I am quite

(Testimony of William C. McDuffie.)

sure I read the telegram to them. To my knowledge, the Security Bank made no comments about that reservation in the telegram.

The Security First National Bank of Los Angeles turned back to us the proceeds of the drafts which it had collected.

The Wells Fargo Bank actually did turn over to us some collections after the receivership. I don't remember the date. Other than the Wells Fargo Bank, there were no creditors of Richfield with secured claims. There were bonds, of course, which are secured claims. To my knowledge the bondholders have not waived their lien. To my knowledge no other creditors who had security have waived their security.

(The foregoing testimony commencing with the words "To my knowledge" was objected to by counsel for complainant. Objection was overruled and exception noted.)

My recollection is that in the latter part of May, I attempted to revoke the power of the Wells Fargo Bank to collect these drafts. I sent a cable direct to the Bank in India or to Birla Bros.

The situation of the Richfield Oil Company became quite acute in the month of May on account of the necessity of paying property taxes. Our need for ready money in the month of May was very impor- [163] tant. There were two acute periods in the money affairs of the receivership, one in February, and one in May. By the latter

(Testimony of William C. McDuffie.)

part of February the condition of the Company was no longer acute because money had been raised to pay the gasoline taxes. I recall testifying this morning that if I had thought there was at any time in the minds of the Wells Fargo Bank the thought that they could take drafts that were deposited there for collection and offset them, or that they were reserving rights against any drafts that were there for collection, that I certainly would have endeavored to take them out. I do not know that that was impossible because my understanding was that certain drafts were there for collection only and were not under that agreement. I understood that it could be done. I doubt very much whether I made inquiry earlier than May of 1931 as to my right to withdraw the drafts because there was never the slightest doubt in my mind that there was any possibility that drafts for collection could be offset, drafts that were not under an agreement —the ordinary drafts.

I don't remember that I ever examined the acceptance agreement in detail. I have not examined it before coming into court today. I know that part of this action rests on the acceptance agreement. I have not studied the matter of the deposit of drafts. The information upon which I base my statement that I never had any idea that the bank could exercise any lien upon these drafts came from various sources. I cannot say exactly. I can only say that I had, myself, become firmly im-

(Testimony of William C. McDuffie.)

pressed with the idea that first of all there was no possibility of the bank asserting any lien against any drafts for collection, and also that the bank had not in its telegram reserved any lien of any character on ordinary collections. At that time I doubt if I had ever read the acceptance agreement. I had never gone in detail into the situation of what drafts were at the Wells Fargo Bank. At the time I received the telegram I have no recollection of consulting my counsel. I don't know when I came to the particular conclusion regarding the lien of the Wells Fargo Bank. It became [164] firmly imprinted in my mind and it was an extraordinary experience to me when the bank exercised it later because I thought there was no possibility of its being done. I do not recall that this matter was actually discussed with any of the banks at the time the telegram was received. I only recall that I read that telegram to some of the bankers and that their examining committee saw the telegram. I have no recollection of any banker asking me, "What is this reservation of the Wells Fargo Bank; what drafts have they?" I have no recollection of any one asking me what these acceptances were. I have received no letter from any banks protesting the action of Wells Fargo Bank & Union Trust Co. in exercising its so-called lien. I received no word from any bank official for the express purpose of discussing that matter.

(Testimony of William C. McDuffie.)

Redirect Examination:

As to the date upon which Wells Fargo Bank undertook to exercise its banker's lien or right of set-off, I had come in contact with some of the representatives of some of the other banks, and I *hav* had discussions with the representatives of some of the other banks who were present at the meeting on January 16, 1931. I have heard some of those bankers voice protests against the action taken by Wells Fargo Bank in attempting to exercise a banker's lien or right of set-off as against the collections of these particular drafts. Every one with whom I have discussed the matter voiced such protest and some of them voiced protests in my hearing and in the hearing and presence of Mr. Ward Sullivan and Mr. Roche. Early in May, I attempted, by cable to the correspondent of the Wells Fargo Bank or to Birla Bros., to revoke the authority of Wells Fargo Bank to collect the proceeds of the Birla Bros. drafts.

At that time I understood and believed that the Birla Bros. drafts were on deposit with the bank merely for the purpose of collection. I did not understand or believe that the Wells Fargo Bank was claiming the right to hold any of those drafts as security under any acceptance agreement. I did not at that time understand or at any time prior thereto understand or believe that any of those drafts that we [165] tried to stop payment on had been deposited with the bank under either any ac-

(Testimony of William C. McDuffie.)

ceptance agreement or for the security of acceptances issued or released by the bank. During the time that I was president of Richfield, I attempted to familiarize myself with its financial affairs and likewise after I became receiver. I likewise attempted to familiarize myself with the obligations owed by the Richfield Oil Company as well as the credits belonging to that company, but I do not remember in what detail I went into it at that time. On the 16th day of January, 1931, I understood that there were drafts in Wells Fargo Bank for collection. I have no specific knowledge regarding the specific drafts that had been deposited with that bank for collection, or the specific drafts that had been deposited with the bank for the purpose of securing the acceptance of them and release by the bank. I knew that some of the drafts were short-term and some long-term. Early in May I was first informed that the long-term drafts were claimed to be held by the bank as security either for acceptances or as having been deposited under an acceptance agreement. I understood that the short-term drafts were being held under the acceptance agreement and that the long-term drafts were being held solely for the purpose of collection.

With respect to this part of my telegram: "It is necessary therefore to request that all banks restore to the receiver full cash balances", the only action that had thus far been taken by any of these banks so far as I was advised was to set off as against the cash balances. I had not been informed that any of the banks had thus far exercised their banker's

(Testimony of William C. McDuffie.)
lien against any of the other assets in their possession belonging to the Richfield Oil Company.

With respect to that part of Plaintiff's Exhibit No. 3, which is the response made by the Bank to my wire of January 16, reading as follows: "We are holding certain collections as security for acceptances. Please understand that we continue to reserve all our rights for bankers lien against these collections", I understood that it referred to such drafts as they were holding as security. [166] I did not understand at that time that this telegram related to any drafts not held by the bank as security and understood by me to be held by the bank merely for the purposes of collection. In May, 1931, when for the first time I attempted to revoke the authority of the bank to make these collections, it was my understanding that the bank merely held these drafts for collection. I know that the Security First National Bank had drafts for collection and that the collections as made were credited to the account of the receiver.

(The foregoing testimony commencing with the words, "With respect to", was objected to by counsel for defendant on the ground it was incompetent, irrelevant and immaterial. Objection was overruled and exception noted.)

During the first year that I was receiver there was never a time when the Richfield Oil Company was not in dire need of cash, and it was necessary for me during that time to get into my possession

(Testimony of William C. McDuffie.)

as quickly as possible all available funds. I cannot remember the exact date when I first learned that the acceptances had been paid in full.

Recross Examination:

I do not recall that I knew that these acceptances were paid at any specific date except when this matter came up and I inquired into it. I am referring to the time when the matter came up in May, 1931. The Security National Bank of Los Angeles did not have any acceptance agreement with Richfield Oil Company to my knowledge. It made no reservations in its telegram or letter of acceptance of my request to restore the cash balances. My understanding is that the Wells Fargo Bank had at the time of my appointment as receiver certain drafts for collection and certain drafts subject to an acceptance agreement and security for certain acceptances. It is not my understanding that there were certain drafts that were deposited and the whole thing was collateral for certain acceptances that were held by the bank. My understanding was that the bank held certain drafts as collateral for certain acceptances pursuant to an acceptance agreement and that it held other drafts for collection. I am sure I would have assumed that pursuant to the acceptance agreement and pursuant to the [167] arrangement between the Richfield Oil Company and the Wells Fargo Bank, the bank had on those certain drafts which were security, not a

(Testimony of William C. McDuffie.)

banker's lien but an actual contractual pledge right. Over a period of time, as I met the representatives of the banks, I mentioned the action of the Wells Fargo Bank to them specifically. I think I spoke both to Mr. Hardacre, Mr. Rude and Mr. Nolan of the Bank of America in Los Angeles, Mr. Page and Mr. Ivey, and I spoke to Mr. Hill representing the American Trust, meeting them casually perhaps at the club, perhaps in the street, or wherever I might see them. I told them and I know that I told them, as it was an important item and I considered that I had a distinct duty toward them and therefore I advised them explicitly in the matter; I considered that not only had Wells Fargo Bank broken faith as far as the receiver was concerned, but it had broken faith with those banks, and I told them that I would pursue to the utmost my endeavor to get that money returned, because I did not think that in any sense of the word Wells Fargo had any right to do it. I explained the situation as best I could, how it all came about. Each one of them protested, not only that they felt there was no right in it, but also that they, themselves, never would have restored their balances had they thought Wells Fargo was reserving in its mind this character of right. I did not show them the telegram, Plaintiff's Exhibit No. 3, when these discussions took place. I did not refer to the reservation of rights in the telegram at the time of these discussions. I made no effort to get the representatives of the banks together as a group and advise them.

(Testimony of William C. McDuffie.)
I advised them of the receipt of the telegram. I heard Mr. Nolan state in court yesterday that he was not so advised.

EDWARD J. NOLAN,

called as a witness for complainant out of order prior to the completion of the testimony of the witness William C. [168] McDuffie, testified as follows:

Direct Examination:

I live in Los Angeles. I have resided there thirty years. I have no business at the present time. The last business in which I was engaged was the banking business. I had been engaged in the banking business twenty-four years. During the month of January, 1931, I was connected with the Bank of America at Los Angeles. My official position was Chairman of the Board. I was president of the Bank of America prior to its consolidation with the Bank of Italy. During the month of January, 1931, I was acquainted with Mr. William C. McDuffie, the receiver of the Richfield Oil Company, and had been acquainted with him for some considerable time prior to that date. I know Mr. Eisenbach, one of the vice-presidents of Wells Fargo Bank & Union Trust Co. I knew him during January, 1931. I had been acquainted with him for quite a few years prior to that date. Prior to January, 1931, I had had discussions with Mr. Eisenbach regarding the affairs of the Richfield Oil

(Testimony of Edward J. Nolan.)

Company. Mr. Eisenbach inquired as to the condition of the Richfield Oil Company and what we thought of its prospects and financial condition. I recall distinctly one occasion; I should say that that was within sixty days prior to the date of the receivership. In January, 1931, the Richfield Oil Company was indebted to the Bank of America in the sum of approximately One Million Four Hundred Thousand Dollars and was indebted to the Bank of Italy for Six Hundred Thousand Dollars, the consolidated amount being when the banks consolidated at Two Million Dollars. That indebtedness was unsecured. Prior to the middle of January, 1931, I was quite familiar with the outstanding unsecured obligations of the Richfield Oil Company, and I conferred with Mr. Eisenbach with respect to those matters.

I was one of the bankers who attended the meeting of January 14, 1931, referred to by Mr. McDuffie as having occurred on the day before his appointment as receiver. Numerous meetings had [169] been held between bankers to whom Richfield Oil Company owed substantial sums of money prior to January 15, 1931. These meetings were held in connection with the outstanding indebtedness for the purpose of protecting banks and the banks' depositors. I recall that Mr. Eisenbach was present at one of those meetings. The bankers were very much concerned about Richfield.

(With respect to the following testimony down to and including the notation of the ob-

(Testimony of Edward J. Nolan.)

jection by defendant and a notation of exception, counsel for complainant offered said testimony for the limited purpose of establishing a waiver and estoppel against defendant with respect to its subsequent right to exercise its alleged bankers' lien and right of setoff and conceded that said testimony would not be binding on defendant except to the extent to which information was afterwards communicated to defendant respecting what occurred at said bankers' meeting.)

At the meeting which occurred on January 16, 1931, there were present Mr. Clark, representing the Continental Bank of Chicago; Mr. Buchanan, representing the First National Bank of Chicago; Mr. Dowling, representing the Chemical National Bank of New York; Mr. L. O. Ivey and Herbert Ivey, representing the Citizens National Bank; James R. Page, representing the California Bank; Carey Hill, representing Tucker Hunter-Dulin, and indirectly the American Trust Company; the Manufacturers Trust Company of New York, Mr. Hardacre and Chester Rude, representing the Security First National Bank of Los Angeles, and myself representing the Bank of America. The Wells Fargo Bank was not represented on that occasion. The bankers were notified to be present at this meeting by Mr. McDuffie. Mr. McDuffie informed the assembled bankers that some of the banks had offset the balances as of the date of the receivership,

(Testimony of Edward J. Nolan.)

and he stated to us that if the company were not to go into bankruptcy it would be necessary for him as receiver to have the necessary cash to meet public utility charges, railroad freight charges and labor charges, and that if the balances that had been off-set were not restored, or if the other banks would not consent not to offset the balances, it would be necessary for the company to file a petition in bankruptcy, or ultimately bankruptcy would result. He said that all the credits and all the funds and all the [170] assets, especially the current assets, that belonged to the company must be turned over to him, otherwise he could not carry on the affairs of the company. I knew in a general way that some of the banks had credits in their possession belonging to the Richfield Oil Company. I was not familiar with the specific amounts of the items. Our bank had accounts in numerous of the branches in California in which there were certain credits belonging to the Richfield Oil Company that were in transit either to the main office in Los Angeles or to the main office in San Francisco. On the day upon which this conference occurred I had no knowledge of the outstanding collections in the possession of my bank. They were quite substantial, scattered throughout California. Our bank received from time to time checks deposited by the Richfield Oil Company of California, received by it in payment of commodities sold outside of California and drawn upon banks outside of California,

(Testimony of Edward J. Nolan.)

and those checks would come in for collection. It was generally understood by all of us that there were outstanding collections in all of the accounts maintained by the Richfield Oil Company in the banks represented at the meeting on the 16th of January, 1931. All of the bankers present who had authority agreed with Mr. McDuffie to restore their balances providing all other banks would do likewise. By balances, I mean items of credit. After that phase of the discussion was concluded, Mr. Ralph Hardacre of the Security First National Bank prepared a telegram. It was subject to comment by all of us. It was finally drafted and Mr. McDuffie called in his secretary in our presence and asked him to transmit the telegrams. Mr. McDuffie himself participated in the preparation of that telegram. The telegram to which I refer is Plaintiff's Exhibit No. 2. I had nothing to do with the transmission of those telegrams. At Mr. McDuffie's request I was to call the Wells Fargo Bank and Mr. Hardacre was to call the Dexter-Horton Bank at Seattle, because they were not present, and acquaint them with what took place at the bankers' meeting that day; after the meeting I put in a call at my office for Mr. Julian Eisenbach of Wells [171] Fargo Bank.

(The foregoing testimony commencing with the words, "At the meeting which occurred", were objected to by counsel for defendant on the ground it was incompetent, irrelevant and

(Testimony of Edward J. Nolan.)

immaterial, and not binding on defendant. Objection was overruled and exception noted.)

During the course of my conversation with Mr. Eisenbach, I stated to him the substance of what had occurred at the meeting of the bankers. I recall explaining to Mr. Eisenbach that unless all of the banks were unanimous in returning the balances that it looked to me as though the company would have to go into bankruptcy; that Mr. McDuffie had stated to us that he had to have certain funds to take care of public utility charges, labor charges and freight charges. Mr. Eisenbach asked me what we intended to do about our balance. I told him we would not offset if the other banks would agree not to offset. He asked me what our balances amounted to and I told him I did not know. He did not say anything as to what his bank would do. I think he said he would have to take it up with Mr. Lipman or take it up with his committee, or words to that effect. That terminated the conversation. At a later date I called Mr. McDuffie on the telephone and asked him if all the banks had agreed. He told me they had agreed and I instructed my Chief Clerk then to reply to Mr. McDuffie's wire. At that time I understood that the Wells Fargo Bank had likewise agreed. We did not exercise any right of setoff.

In giving the instruction to my Chief Clerk not to exercise any right of setoff or a banker's lien I relied on the information I had received that all of

(Testimony of Edward J. Nolan.)

the banks including the Wells Fargo Bank & Union Trust Co. had either restored the balances where the balances had been set off, or had agreed not to set off the balances.

(The foregoing testimony commencing with the words, "In giving the instruction", was objected to by counsel for defendant on the ground that it was the opinion and conclusion of the witness. Objection was overruled and exception noted.)

Cross-Examination:

I communicated with Mr. McDuffie by telephone and asked him if all the banks had agreed to forego their banker's lien. As I recall it, [172] Mr. McDuffie told me that all the banks had agreed. The whole question of agreement between the banks was to restore the cash balances and such items as were in transit. For instance, in our institution there were many items in transit from the branch banks. In referring to cash balances and items in transit, I mean the ordinary items in transit in the banking world—such credits as there may be back and forth, such as checks or collections.

I do not recall that Mr. McDuffie read to me the telegram of the Wells Fargo Bank & Union Trust Co. as to the terms upon which its acceptance was given. I do not recall that he ever told me about that. All that he told me was that the banks had agreed either to restore balances or to forego their banker's liens, and upon that representation I

(Testimony of Edward J. Nolan.)

ordered the Chief Clerk to release the balances in our bank. The first time that I saw that telegram was the time Mr. Roche came to call on me in Los Angeles, within the past week or so.

The telegram to the banks was dictated by all of us and Mr. Hardacre transcribed it or took it down. We were satisfied with the language of the telegram, it being the work of about twelve of us. It was intended to be the agreement between the bankers with some amplification, and I think that is why Mr. McDuffie suggested that we get in touch with Mr. Arnold of Dexter-Horton and Mr. Eisenbach of Wells Fargo. The amplification was not that something was desired besides the telegram itself, but to explain to banks not present the dire condition of the company and the importance and necessity of returning the balances at once, or else the company would be forced to go into bankruptcy.

In my opinion as a banker, drafts for collection in foreign countries are not cash balances. It depends upon the agreement entered into.

Redirect Examination:

I understand balances in a bank would be such items that are deposited for credit and collected, or if there is an agreement with the depositor that one may draw on uncollected items, we sometimes consider that as a balance. I would regard foreign drafts [173] deposited with a bank for collection

(Testimony of Edward J. Nolan.)

as credits, and when the drafts are collected and the money comes into the possession of the bank I would regard that as cash balances. As stated in cross examination, the primary reason for telephoning Mr. Eisenbach was to elaborate upon the wire that was prepared by the bankers in cooperation with Mr. McDuffie and to explain the dire condition of the receivership; that if the balances were not restored or if the bankers' liens were to be exercised by the different banks that it would be necessary for the company to go into bankruptcy. I do not recall that anything was said during the conference between me and Mr. Eisenbach as to the future course of the business. I told Mr. Eisenbach that it would be necessary that the receiver have all the funds of the Richfield Oil Company for the purpose of continuing the business and to avoid bankruptcy. Mr. McDuffie went to great length in explaining to all of us that obligations from day to day arose in the Richfield Oil Company that had to be liquidated in some way. I tried to pass that on to Mr. Eisenbach, I tried to pass on to Mr. Eisenbach just what took place at the meeting that morning. I was subpoenaed as a witness here, but I did not want to come.

Recross Examination:

Foreign drafts can be considered as credits. It depends upon the arrangements between the bank and the depositor. When foreign drafts are collected whether or not they become cash balances

(Testimony of Edward J. Nolan.)

depends upon the agreement. It depends upon the agreement whether they become cash balances on collection and whether they are credits in the course of collection. The ordinary course is that they are immediately deposited to the credit of the company or the customer. In my conversation with Mr. Eisenbach, I went into the question of the necessity of having all the funds of the Richfield Oil Company available to the receiver. I mentioned to him the fact that there were bills outstanding, that there were payrolls to be met, that there were pressing payments to be made on certain definite and unavoidable obligations and that the cash balances in the banks should be made available. I urged very strongly that he agree. [174]

In my conversation with Mr. Eisenbach, I urged that there was at that time an emergency and danger of bankruptcy to Richfield Oil Company if the banks held out the cash balances in the accounts of Richfield. That was the principal part of my conversation.

Further Redirect Examination:

Nothing was said by Mr. McDuffie that if these balances were restored and bankruptcy avoided that the receivership would terminate. He said that he felt sure he could carry on the receivership if these funds were made available and all of the assets of the corporation were turned over to him.

If a draft is deposited in a bank by a depositor

(Testimony of Edward J. Nolan.)

or a merchant for collection, I would regard that as one of his credits. In the absence of any agreement to the contrary, if a foreign draft is deposited with a bank for collection and the bank collects the amount due upon the draft, I would regard that as a credit. When collection is made and the money comes into the possession of the bank, it is a balance due the customer.

Further Recross Examination:

Where drafts are deposited for collection and a loan is made against them, coupled with an express agreement that the drafts are to be security for that loan and every other loan of the drawer, such drafts would not be a credit.

I know nothing of the circumstances of the Richfield Oil Company collections with the Wells Fargo Bank, and I knew nothing about that matter on January 15, 1931. I knew nothing about it on January 16, 1931, when I telephoned to Mr. Eisenbach. The receiver had not told me anything about that in the conference.

HOMER E. POPE,

was then called as a witness by the plaintiff, and testified as follows: [175]

Direct Examination:

I reside in Los Angeles and have resided there approximately seven years. I have worked for the

(Testimony of Homer E. Pope.)

Richfield Oil Company since September, 1929. When first employed by that concern I was a clerk and handled the foreign drafts in the Foreign Department. At that time Mr. Hall was the Manager of the Foreign Exporting Department. I remained connected with that department until November, 1931. I was in the foreign office at the time Mr. McDuffie was appointed receiver. My sole duty was to look after foreign drafts and their collection. I kept track of the foreign drafts to see that they were paid when due and I took care of the details of the financing of foreign shipments and all matters that related to foreign drafts. I did not actually prepare the documents themselves, but they passed through my hands after they were prepared and I looked them over to see that they were correct. As far as I know, Mr. Hall negotiated the foreign sales, and likewise negotiated the terms upon which those foreign sales were made. The Traffic Department took care of the actual preparation of the bills of lading and the items pertaining to the shipment. The drafts were prepared in the Foreign Department and also the letters of transmittal. I kept a complete record of the drafts with the detailed information sufficient to identify each draft and its disposition. I had complete information on each draft concerning whether it was discounted or whether it was deposited with banks for collection. I was likewise required to keep in touch with customers for the

(Testimony of Homer E. Pope.)

purpose of estimating the approximate time when the drafts and documents would be delivered to the customer or when the drafts would be presented for acceptance. It was my understanding that as a general practice the documents, including drafts, went forward on mail boats whereas the cargo went forward on regular cargo boats. It was customary for the drafts and the documents to reach the place of destination of the cargo some days and sometimes some weeks or possibly more than a month in advance of the cargo. Prior to the [176] month of October, 1930, I had not come in contact personally with any of the officials of the Wells Fargo Bank. The first time I met any of the officials of the Wells Fargo Bank in connection with the collection of drafts or the use of drafts by way of security for acceptances was on my trip to San Francisco in the early part of October, 1930. Prior to the early part of October, 1930, the Richfield Oil Company had been doing business insofar as its foreign drafts were concerned with the Security First National Bank of Los Angeles. The custom of the Richfield Oil Company was to deposit some of the drafts for collection and some were discounted.

Very soon after I was employed by the Richfield Oil Company, I became familiar with the fact that commodities and goods were being shipped by Richfield Oil Company to a firm known as Birla Bros. Ltd., Calcutta. Birla Bros. Company was a steady and constant customer of the Richfield Oil Com-

(Testimony of Homer E. Pope.)

pany. Prior to the month of October, 1930, drafts had been drawn on Birla Bros. for acceptance in connection with shipments made to it. Prior to the month of October, 1930, Birla Bros. had never failed to pay a draft to my knowledge.

(The foregoing testimony commencing with the words, "Prior to the month of October, 1930", was objected to by counsel for defendant as incompetent, irrelevant and immaterial. Objection was overruled and exception noted.)

On October 5, 1930, I came to San Francisco with Mr. Hall. In order to enable me to testify in this case, during the past several weeks I have refreshed my recollection by making an examination of records and likewise examining correspondence which came to my attention and under my observation during the history of these transactions.

Before coming to San Francisco, there had come to my attention an acceptance agreement proposed to be entered into between Richfield Oil Company and Wells Fargo Bank. This agreement was in my possession at the time I left Los Angeles. I had obtained the [177] agreement from Mr. Hall some few days before coming to San Francisco. I also had in my possession certain proposed acceptances known as drafts in the aggregate amount of $150,000.00. They were divided into acceptances of various amounts totalling $150,000.00. This acceptance agreement was signed by Mr. McKee and Mr. Hart on behalf of Richfield Oil Company

(Testimony of Homer E. Pope.)

of California. Mr. McKee was Vice President and Assistant to the Chairman of the Board, and Mr. Hart was the Treasurer of Richfield Oil Company.

Plaintiff then offered in evidence the document entitled "Acceptance Agreement". The same was received in evidence and marked Plaintiff's Exhibit 16. Said document was in the words and figures as follows:

"ACCEPTANCE AGREEMENT

(Arising out of importation or exportation of goods)

To WELLS FARGO BANK & UNION TRUST CO.—San Francisco.

Dear Sirs:

We hand you herewith, for acceptance, the following drafts:

Number	Date	Covering following merchandise	Amount
	Oct. 6		$150,000

Marks	Numbers	Description

Payable in San Francisco to the order of Ourselves

It is agreed that the proceeds of the above will be used for financing the actual goods

(Testimony of Homer E. Pope.)

under consideration, and the proceeds of the sale of the goods shall be applied to liquidate the acceptance.

In consideration of your acceptance of the said draft or drafts the undersigned, jointly and severally, agree [178] to pay you at the time of the acceptance a commission of ..... per cent, and further agree to pay you the amount of the said draft or drafts at your office one day before maturity. We waive all liability on your part in case the goods are not according to contract, either in description, quality, or quantity, or in any other respect. All bills of lading, warehouse receipts and other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted and bind ourselves to furnish you prior to ..... with shipping documents covering this merchandise or with exchange arising out of the transaction being financed by the credit.

We further agree to give and furnish you on demand additional security or to make payment on account in amounts and character satisfactory to you. If we fail to comply with any such demand or in case of our insolvency, assignment, bankruptcy, or failure in business, all our obligations and liabilities direct or in-

(Testimony of Homer E. Pope.)

direct to you whether arising hereunder or otherwise shall forthwith become due and payable without demand or notice. All goods represented by bills of lading, warehouse receipts or other documents of title, pledged with you as security for your acceptances hereunder, shall be at all times covered by us by certificates of insurance under open policies to your order or by specific policies payable to you as your interest may appear, to an amount sufficient to cover your advances or obligations hereunder, and you are to have specific claim and lien on such policies and their proceeds to the amount of your interest in the goods thereby insured.

The undersigned hereby consents to any renewal and extension of time of payment of any draft, drafts or other indebtedness that may be granted by you, and do also consent that the securities set forth in said acceptance agreement may be exchanged or surrendered from time to time without notice to or further assent from the undersigned, and that the undersigned will remain bound by this guarantee, notwithstanding such changes, guarantees, renewals and extensions.

Upon our failure to comply with any of the terms hereof or upon the non-payment by us of this or any other liability to you when due

(Testimony of Homer E. Pope.)

or at any other time or times thereafter then in such case all obligations and liabilities direct and contingent from us to you whether arising hereunder or otherwise shall at your election forthwith become due and payable without demand or notice and we hereby give to you full power and authority to sell, assign, transfer and deliver the whole or any part of the securities, bills of lading or documents of title or the goods represented thereby or of any securities substituted therefor or added thereto at any broker's board or at any public or private sale with or without notice or advertisement at your option and do further agree that you may become a purchaser at such sale if at any broker's board or at public auction and hold [179] the property or security so purchased as your own property absolutely free from any claim of or in the right of ourselves. In case of any sale or other disposition of the whole or any part of the security or property aforesaid, you may apply the proceeds of such sale or disposition to the payment of all legal or other costs and expenses of collection, sale and delivery and of all expenses incurred in protecting the security or other property or the value thereof, as hereinafter provided and may apply the residue of such proceeds to the payment of this or of any then existing liabil-

(Testimony of Homer E. Pope.)

ity of ours to you whether then payable or not, returning the overplus to us and in case of any deficiency we agree to pay to you the amount thereof forthwith with legal interest. You may also upon any such non-payment apply the balances of all our deposit accounts in the same way that you are authorized to apply the proceeds of any sale of the security or property hereunder.

You may pay taxes, charges, assessments, liens or insurance premiums upon the security or any part of it, or otherwise protect the value thereof or of the property represented thereby, and may charge against us all expenditures so incurred; but you shall be under no duty or liability with respect to the protection or collection of any security held hereunder or of any income thereon, nor with respect to the protection of preservation of any rights pertaining thereto, beyond the safe custody of such security. We hereby agree that if, in your opinion, the market value of the security hereby or hereafter pledged to secure this obligation, after deducting all charges against the same is at any time less than the amount thereof and————per centum thereof added thereto we will upon demand, deposit satisfactory additional security so that the market value of the security pledged hereunder, after deduct-

(Testimony of Homer E. Pope.)

ing all charges, shall always equal the amount of this obligation plus such additional percentage.

We hereby agree to indemnify you against any liability or responsibility for the correctness, validity, or genuineness of any documents or any signatures or endorsements thereon representing goods which you hold, purchase or sell under this engagement, or for the description, quantity, quality or value of the property declared therein, or of any insurance certificates or policies, and against any general loss or charges or other expenses incurred accruing with respect to such goods through delay in transmission of shipping documents or through any other cause, which charges and other expenses we agree to pay. We further agree that no delay on your part in exercising any right hereunder shall operate as a waiver of such rights or of any right under this obligation.

RICHFIELD OIL COMPANY OF CALIFORNIA

By R. W. McKee

By W. E. Hart

Treasurer

Dated October 4, 1930." [180]

These acceptances dated October 6, 1930, which you show me are the ones which I brought with me to San Francisco. They aggregate $150,000.00.

(Testimony of Homer E. Pope.)

Plaintiff then offered in evidence nine of said acceptances aggregating the sum of $115,000.00, and the same were received in evidence and marked as Plaintiff's Exhibit 17. The reason for separating the acceptances into different exhibits was because at the time of the witness' trip to San Francisco only $115,000.00 worth of them was issued.

Plaintiff then offered in evidence an acceptance dated October 6, 1930, and accepted October 15, 1930, in the sum of $5,000.00, and said acceptance was received in evidence and marked as Plaintiff's Exhibit 18.

Plaintiff then offered in evidence an acceptance dated October 6, 1930, and accepted October 21, 1930, in the sum of $10,000.00, and said acceptance was received in evidence and marked Plaintiff's Exhibit 19.

Plaintiff then offered in evidence three acceptances each dated October 6, 1930, and each accepted on November 28, 1930, two of which were in the sum of $5,000.00, and the third of which was in the sum of $10,000.00, and said acceptances were received in evidence and marked Plaintiff's Exhibit 20.

The total amount of all of said acceptances was the sum of $150,000.00. With the exception of the amounts and dates, each of said acceptances was in the words and figures as follows:

(Testimony of Homer E. Pope.)

$5000

San Francisco, California, October 6, 1930

Ninety (90) Days After Sight

Pay to the Order of OURSELVES

Five Thousand.....DOLLARS

Value received and charge the same to the account of

To

WELLS FARGO BANK & UNION TRUST CO.

Market at Montgomery

11-16

SAN FRANCISCO, CAL.

RICHFIELD OIL COMPANY OF CALIFORNIA

By R. W. McKee

By W. C. Hart

Treasurer" [181]

Except for the date, each of said acceptances was accepted by Wells Fargo Bank & Union Trust Co. in the words and figures following:

"Accepted the 8th day of October, 1930

WELLS FARGO BANK & UNION TRUST CO.

By .....

By ....."

Said witness testified further as follows:

When I delivered the agreement and the acceptances in blank, that is, not accepted by the

(Testimony of Homer E. Pope.)

bank, I obtained a receipt. This receipt dated October 6, 1930, which you show me is the one to which I refer.

Plaintiff then offered in evidence said receipt and the same was received in evidence and marked Plaintiff's Exhibit 21. Said receipt is in the words and figures as follows:

"San Francisco, October 6, 1930. $150,000.00
RECEIVED FROM RICHFIELD OIL COMPANY OF CALIFORNIA One Hundred Fifty Thousand and 00/100 Dollars. Signed and blank endorsed acceptance forms on this bank; all dated October 6, four at $5,000.00 each, eight at $10,000.00 each and two at $25,000.00 each.

WELLS FARGO BANK & UNION TRUST CO.
San Francisco
C. B. CLEMO."

Said witness testified further as follows:

I went to the bank in company with Mr. Hall and upon our arrival we met Mr. Gilstrap who was Assistant Manager of the Foreign Department of the Wells Fargo Bank. We remained with Mr. Gilstrap about an hour or so.

I came up to San Francisco for the purpose of familiarizing myself with the manner in which the collections were to be made by the Wells Fargo Bank, and likewise to learn something about these proposed acceptances. At that time I knew nothing

(Testimony of Homer E. Pope.)

about bank acceptances. Mr. Gilstrap told me how they were handled and what [182] routine would be necessary to go through in the handling of them. As I testified before, the foreign business of the Richfield Oil Company had been handled by the Security Bank in Los Angeles, and there was a desire on the part of Mr. Hall to make a change from the Security Bank to Wells Fargo Bank, and that was one of the purposes of our visit.

Mr. Hall explained to Mr. Gilstrap that he brought me up for the purpose of familiarizing me with the method of handling the bank acceptances. Mr. Gilstrap told me that the release of acceptances would have to be based on drafts, the maturity date of which would be such that the funds would arrive in San Francisco before the maturity date of the bank acceptances.

Upon the occasion of this trip Mr. Hall and I brought no drafts to San Francisco other than the bank acceptances. We brought no drafts representing any foreign shipments.

Mr. Hall explained to Mr. Gilstrap the type of draft in general that we took covering foreign shipments. The discussion was more or less based upon the general character of the drafts customary to each country. Mr. Hall told Mr. Gilstrap that our customers were all good credit risks. Reference was particularly made to one of our customers—Birla Bros. Mr. Hall explained they were one of

(Testimony of Homer E. Pope.)

our best customers; that they purchased a great deal of goods from us and had always been very prompt pay. At that time Mr. Gilstrap told us that the Wells Fargo Bank had made an investigation of Birla Bros. and disagreed with us as to their financial stability. We explained to Mr. Gilstrap our method of drawing on Birla Bros. We told him that we drew on each shipment one-half of the total shipment at sight and the other one-half at 180 days. The question came up as to whether we might base acceptances on both sets of drafts. He told us he would be glad to consider the sight draft but because of the length of time [183] and because of the credit standing, he would not consider the 180 day drafts on Birla Bros. We argued with him that we had never had any trouble with Birla Bros. and that they had always been very prompt pay, and we urged him to let us use the 180 day drafts as a basis for bank acceptances, but he refused.

It was brought out that in the case of foreign drafts the length of time from the receipt of the draft by the bank to the receipt of the proceeds thereof would be longer than the time which appeared on the face of the draft due to the fact that time would be required for the document to go from San Francisco to the foreign country and also for the proceeds to come from the foreign country back to San Francisco. In other words, with respect to the 180 day drafts, we would have to add to the

(Testimony of Homer E. Pope.)

180 days the time it would take the draft to get to the foreign country and the time it would take the proceeds to arrive in San Francisco after the payment of the draft.

Mr. Gilstrap told us that the bank might under some conditions consider 120 day bank acceptances but they were not considered prime paper because of the length of time. I asked him as a matter of information whether it would be possible to utilize the 180 day Birla Bros. drafts as a basis for bank acceptances after a sufficient period had elapsed so that the proceeds might arrive in San Francisco within the 90 day period of prime commercial paper. He told me that it was a possibility only and not to be seriously considered. Mr. Gilstrap told us that a 90 day bank acceptance was best because it was considered prime commercial paper. Mr. Gilstrap told us that he would be glad to take the 180 day paper for collection. He told us that we could not use the 180 day paper to base bank acceptances. He told us that it would be necessary to put up a sufficient amount of drafts in money to cover the bank acceptances. [184] It would only be necessary to have enough from the proceeds of the drafts to cover the bank acceptances to be paid. Mr. Gilstrap expressed a willingness to discount paper, but it was mentioned that the acceptance arrangement would save the company money, and that it was a better way to handle our collections.

(Testimony of Homer E. Pope.)

In about an hour Mr. Leuenberger came out of his office and was introduced to us. Mr. Gilstrap briefly gave Mr. Leuenberger an outline of our previous conversation.

During the course of the conversation Mr. Hall said that he wanted the transactions with the Foreign Department considered a thing apart from the regular transactions of Richfield with the bank. To my knowledge no objection was made at that time to this by Mr. Gilstrap.

> (Objection was made by counsel for defendant to the foregoing testimony commencing with the words, "During the course of the conversation," on the ground that it tended to vary the terms of the acceptance agreement. Objection was overruled and exception noted.)

In the course of the conversation, it was said that in the event the proceeds of the drafts placed under the acceptances might not be sufficient to meet the acceptances when they matured, it would be necessary for the Richfield Oil Company to send Wells Fargo Bank a check to cover the deficiency.

I was familiar with the correspondence passing between the Wells Fargo Bank and Richfield Oil Company with respect to these transactions and I was familiar with the letters of transmittal to the bank that accompanied the drafts, documents, etc. I kept a record of all receipts and collections and advices by the bank respecting the payment of the

(Testimony of Homer E. Pope.)

proceeds of the drafts and the application of the proceeds.

At the time of our visit to San Francisco on the 5th of October, 1930, a shipment was being prepared for Birla Bros. and after we returned to Los Angeles the papers, documents and drafts covering that shipment were prepared. On October 7th, these papers were finally turned over to Mr. Hall. We returned to Los Angeles [185] on the night of October 6th, and on the night of October 7th Mr. Hall went back to San Francisco, and he brought with him to San Francisco the documents, drafts and letters of transmittal respecting this shipment to Birla Bros. The copy of the letter addressed to Wells Fargo Bank and the copies of the drafts and of the invoices which you are showing me are copies of the documents which were turned over to Mr. Hall to bring back. The copy of another letter dated October 7, 1930, likewise addressed to Wells Fargo Bank, and the drafts and invoices are likewise copies of another letter and documents pertaining thereto that were turned over to Mr. Hall on that date. These copies of the two transmittal letters, of the drafts and of the invoices are carbon copies and true and correct copies of the originals which accompanied the original letter sent to the Wells Fargo Bank.

Plaintiff then offered in evidence copies of the first transmittal letter and accompanying drafts hereinbefore referred to, and the same were re-

(Testimony of Homer E. Pope.)

ceived in evidence and marked Plaintiff's Exhibit 22. Said documents were in the words and figures following:

"October 7, 1930.

Wells Fargo Bank and Union Trust Company,
Market at Montgomery,
San Francisco, California.

Subject: Drafts #103004 and #103005,
Birla Brothers, Ltd. M/S 'SILVER HAZEL'

Gentlemen:

We are enclosing the following enumerated documents covering shipment going forward to Calcutta, India per the M/S 'SILVER HAZEL':

1—Our Draft #103004 amounting to $63,-950.00 drawn at sight on Birla Brothers, Ltd.

2—Our Draft #103005 amounting to $63,-950.00 drawn at 180 days sight on Birla Brothers, Ltd.

3—Our Invoice #930112 in the amount of $127,900.00.

4—Insurance Policy in triplicate.

5—Three originals Bill of Lading.

Provided these documents are found to be in order, please forward them to your correspondent bank at Calcutta, requesting them to notify you immediately by wire of non-acceptance or non-payment of Draft at maturity. [186]

(Testimony of Homer E. Pope.)

Thanking you, we remain

Yours very truly,

RICHFIELD OIL COMPANY
OF CALIFORNIA

FDS-W B. D. Blanchard,
enc Assistant Manager,
CC to Homer Pope Foreign Department.

$63,950.00 Los Angeles, California
October 8th, 1930

At 180 days sight—documents against acceptance of this first of exchange (second unpaid) pay to the order of Richfield Oil Company of California Sixty-Three Thousand Nine Hundred Fifty and—No/100 Dollars with Exchange Stamp Tax and all Collection Charges Value received and charge to account of E. O. 1005, Inv. 930112, M/S 'Silver Hazel'
To Birla Brothers, Ltd., Richfield Oil Company of California, Calcutta.
No. 103005 India By

$63,950.00 Los Angeles, California
October 8th, 1930.

At sight of this first of exchange (second unpaid) pay to the order of Richfield Oil Company of California Sixty-Three Thousand Nine Hundred Fifty and No/100 Dollars with exchange, Stamp Tax and all Collection Charges

(Testimony of Homer E. Pope.)

Value received and charge to account of E. O. 1005, Inv. 930112 M/S 'Silver Hazel'

To Birla Brothers, Ltd.
Calcutta
No. 103004 India

RICHFIELD OIL COMPANY
OF CALIFORNIA
By ”

Plaintiff then offered in evidence copies of the second transmittal letter and accompanying drafts hereinbefore referred to, and the same were received in evidence and marked as Plaintiff's Exhibit 23. Said documents were in the words and figures as follows:

“October 7, 1930

Wells Fargo Bank and Union Trust Company,
Market at Montgomery,
San Francisco, California.

Subject: Drafts #103006-A and #103006-B,
Birla Brothers, Ltd. M/S
'Silver Ray'

Gentlemen:

We are enclosing the following documents covering shipments going forward to Calcutta and Bombay, per the M/S 'Silver Ray':

1—Our Draft #103006-A amounting to $55,-900.76 drawn at sight on Birla Brothers, Ltd. at Calcutta. [187]

2—Our Draft #103006-B amounting to $55,-900.75 drawn at 180 day sight D/A on Birla Brothers, Ltd. at Calcutta.

(Testimony of Homer E. Pope.)

3—Three copies of our Invoice #103009 amounting to $2,482.08.

4—Three copies of our Invoice #930114 amounting to $24,228.00.

5—Insurance Policy in triplicate covering drums.

6—Insurance Policy in triplicate covering cases.

7—Three originals Bill of Lading.

8—Our Invoice #103008 amounting to $69,000.

9—Our Invoice #103007 amounting to $16,-091.43.

10—Insurance Policy in triplicate covering drums.

11—Insurance Policy in triplicate covering cases.

12—Three originals Bill of Lading.

Provided these documents are found to be in order, please forward them to your correspondent bank for collection, requesting them to notify you immediately by wire of non-acceptance or non-payment of Draft at maturity.

Thanking you, we remain

Yours very truly,

RICHFIELD OIL COMPANY OF CALIFORNIA

FDS-W

enc

CC to Homer Pope

B. D. Blanchard,

Assistant Manager,

Foreign Department."

(Testimony of Homer E. Pope.)

"$55,900.76 Los Angeles, California
October 8th, 1930.

At sight of this first of exchange (second unpaid) pay to the order of Richfield Oil Company of California Fifty-Five Thousand Nine Hundred and 76/100 Dollars with exchange, Stamp Tax and all Collection Charges

Value received and charge to account of E. O. 1005-6-7-56, Inv. 930114, 103007-8-9, M/S 'Silver Ray'

To Birla Brothers, Ltd.,
Calcutta,
No. 10300-A India.

RICHFIELD OIL COMPANY
OF CALIFORNIA
By ,,

"$55,900.75 Los Angeles, California
October 8th, 1930.

At 180 days sight—documents against acceptance of this first of exchange (second unpaid) pay to the order of Richfield Oil Company of California Fifty-Five Thousand Nine Hundred and 75/100 Dollars with exchange, Stamp Tax and all Collection Charges. [188]

Value received and charge to account of E. O. 1005-6-7-56. Inv. 930114, 103007-8-9, M/S 'Silver Ray'.

To Birla Brothers, Ltd.
Calcutta,
No. 103006-B India.

RICHFIELD OIL COMPANY
OF CALIFORNIA
By

(Testimony of Homer E. Pope.)

Said witness testified further as follows:

We kept records in our office showing receipts issued by Wells Fargo Bank for drafts delivered to it. The document which you have just shown me is a receipt for drafts deposited with Wells Fargo Bank to date of the receipt. The drafts shown upon the transmittal letters just introduced in evidence are mentioned in this receipt. There are also some additional drafts which were transmitted by Richfield Oil Company to the bank between October 7, 1930, and the date of the receipt.

Plaintiff then offered in evidence the receipt mentioned and the same was received in evidence and marked Plaintiff's Exhibit 24. Said receipt was addressed to Richfield Oil Company of California, attention of Homer E. Pope, was signed by Wells Fargo Bank & Union Trust Co., and dated October 14, 1930. Said document acknowledged receipt of the four drafts hereinabove set forth in Exhibits 22 and 23, as well as several other drafts not yet in evidence.

The witness' attention was then directed to a document consisting of three sheets, the first of which was entitled "Richfield Oil Company of California, William C. McDuffie, receiver; drafts deposited for collection with Wells Fargo Bank & Union Trust Co., San Francisco, from inception to January 15, 1931."

Said witness testified further as follows:

(Testimony of Homer E. Pope.)

This document was prepared under my direction and to the best of my knowledge and belief, those tabulations are correct.

(Counsel for plaintiff here stated that defendant was not to be bound by any of the headings or titles on said table. Said document was marked Plaintiff's Exhibit 25 for identification. Said document was later, on the cross examination of said witness, introduced in evidence as Plaintiff's Exhibit 25, merely for the purpose of illustration and as a tabulation by which defendant is not bound.) [189]

With reference to the first column of the first page of Plaintiff's Exhibit No. 25 for identification, the names of the customers appear under the title "Customer". In the next column, under the title "Draft No." appears the numbers of the drafts drawn on the customers. In the third column, under the title "Amount" appears the amount of the face of the draft. In the fourth column under the title "Date deposited" appears the date the draft was deposited in the bank. In the next column, under the title "Due Date in Foreign Country" appears the date the draft is due or expected to be due in the foreign country. In the next column, under the title "Date Paid" appears the date upon which the draft was paid in San Francisco. The asterisks or stars in red refer to drafts, the proceeds of which were withheld by

(Testimony of Homer E. Pope.)

defendant bank. The second page of the document is a continuation of the information set forth on the first. Upon this appears the total of the drafts as to which the bank claims a lien, namely $145,980.80. The total amount of other drafts is set forth as $197,390.59. The total of these two figures is $343,371.39. With reference to the deposit date appearing on the face of the schedule, a note appears thereon reading as follows: "Date of deposit as shown above is date mailed to San Francisco; papers actually deposited in bank one day later". Referring to the third page, which is entitled "Richfield Oil Company of California, William C. McDuffie Receiver; Statement of Bank Acceptances Issued for the Account of Richfield Oil Company of California by Wells Fargo Bank & Union Trust Co., San Francisco, and Payments Thereof by Application of Draft Collections", the first column represents the date on which the acceptances were released, the second column represents the amount and the third column represents the due date of each acceptance. Of the last three columns under the general heading "Payment by Application of Drafts", the first column represents the date, the second column the amount and the third column the draft numbers, and the total is $155,000.00. [190]

Other drafts were sent up to the bank from time to time. After the acceptances were accepted by the bank they were released by the bank and

(Testimony of Homer E. Pope.)

immediately thereafter a credit was given to the Richfield Oil Company for the disposition price of those acceptances. I dictated the letter, a carbon copy of which you are calling to my attention, dated October 13, 1930, said letter having been signed by Mr. Lyons of Richfield Oil Company and being addressed to the bank. Mr. Lyons was the Comptroller of Richfield Oil Company.

The two carbon copies of two letters of transmittal and the drafts attached thereto, dated October 8, 1930, and October 9, 1930, are accurate copies of the originals, and were sent to the Wells Fargo Bank upon their respective dates together with the documents referred to therein.

Plaintiff then offered in evidence said copy of said letter dated October 8, 1930, with a copy of the draft attached, and said letter and copy of draft were received in evidence and marked Plaintiff's Exhibit 26. Said letter is in the words and figures as follows:

"October 8, 1930

Wells Fargo Bank and Union Trust Company,
Market at Montgomery,
San Francisco, California.

Subject: Draft #103009—Ricardo Velazquez,
SS 'Sarramacca'

Gentlemen:

We are enclosing the following documents covering shipment of 200 drums of gasoline going forward to Buenaventura, Colombia per the

(Testimony of Homer E. Pope.)

SS 'Sarramacca', for the account of Ricardo Velazquez, Cali, Colombia:

1—Our Draft #103009 amounting to $2,442.40 drawn at 60 days sight D/A on Ricardo Velazquez, Cali, Colombia.

2—Three copies our Invoice #103006 amounting to $2,442.40.

3—Three copies Packing List.

4—Consular Invoice. [191]

5—Insurance Policy in triplicate.

6—Three originals Bill of Lading.

Provided these documents are found to be in order, please forward them via Airmail to Banco Aleman Antiqueno at Cali, Colombia, for collection, requesting them to advise you by wire immediately of non-acceptance or non-payment of Draft at maturity.

Thanking you, we remain

Yours very truly,
RICHFIELD OIL COMPANY
OF CALIFORNIA."

Plaintiff then offered in evidence said copy of said letter dated October 9, 1930, and said letter was received in evidence and marked Plaintiff's Exhibit 27. Said letter is in the words and figures as follows:

(Testimony of Homer E. Pope.)

"October 9, 1930
Registered Mail
Special Delivery

Wells Fargo Bank and Union Trust Company,
Market at Montgomery,
San Francisco, California.

Subject: Draft 103010—Bettiger Trepp y Cia, SS 'Sarramacca'

Gentlemen:

We are enclosing the following enumerated documents covering shipment going forward to the Port of Arica per the SS 'Sarramacca' for the account of Messrs. Bottiger Trepp y Cia of La Paz, Bolivia:

1—Our draft #103010 amounting to $11,-031.14 drawn at sight D/A on Bottiger Trepp y Cia of La Paz, Bolivia.

2—Three copies our Invoice #103016 amounting to $1,130.06.

3—Three copies our Invoice #103017 amounting to $212.00.

4—Three copies Packing List.

5—One copy Certified Commercial Invoice.

6—One copy Consular Invoice.

7—Duplicate and triplicate Insurance Policy.

8—Second and third original Bill of Lading.

9—Three copies our Invoice #103012 amounting to $5,643.80. [192]

10—Three copies our Invoice #103013 amounting to $2,544.00.

(Testimony of Homer E. Pope.)

11—Three copies Packing List.
12—One copy Certified Commercial Invoice.
13—One copy Consular Invoice.
14—Duplicate and triplicate Insurance Policy.
15—Second and third originals Bill of Lading.
16—Three copies our Invoice #103015, amounting to $1501.28.
17—One certified Commercial Invoice.
18—Duplicate and triplicate Insurance Policy.
19—Second and third originals Bill of Lading.

The original of each certified Commercial Invoice, Consular Invoice, Insurance Policy and Bill of Lading have been sent via Airmail direct to Dauelsberg & Co. at Arica, in order that they may clear through the customs without delay or fine.

You will also note that the copy of the Consular Invoice covering 650 cases Gasoline, as per our Invoice #103015, is missing. We are having copy of this document made and will forward it to you as quickly as it is received.

Provided these documents are found to be in order, please forward them for collection, via Airmail, to Banco de la Nacion Boliviana at La Paz, requesting them to notify you by wire if the Draft is not paid promptly.

Thanking you, we remain,

Yours very truly,
RICHFIELD OIL COMPANY
OF CALIFORNIA."

(Testimony of Homer E. Pope.)

Plaintiff then offered in evidence the original of said letter dated October 13, 1930, and said letter was received in evidence and marked Plaintiff's Exhibit 28. Said letter was in the words and figures as follows:

"October 13, 1930

Wells Fargo Bank and Union Trust Company,
Market at Montgomery,
San Francisco, California.

Gentlemen:

Attention: Mr. Gilstrap,
Assistant Cashier.

Our records show that we have with your good bank a draft reserve of $9,734.16 against which no acceptances have been issued. [193]

If this information is correct, please issue one of the drafts which you now hold, for $5,000.00, payable in ninety days.

Thanking you for your courtesy in this matter,

Yours very truly,
G. P. LYONS, Comptroller."

Plaintiff then offered in evidence a carbon copy of letter dated October 15, 1930, from Wells Fargo Bank & Union Trust Co. to the Richfield Oil Company of California, Los Angeles, California, and said copy of said letter was received in evidence and marked Plaintiff's Exhibit 29. Said letter was in the words and figures as follows:

(Testimony of Homer E. Pope.)

"October 15, 1930

Richfield Oil Company of California,
555 South Flower Street,
Los Angeles, California.

Gentlemen: Attention Mr. H. E. Pope.

In accordance with your letter of October 13, we have been very pleased to execute an acceptance for $5,000. at 90 days sight. This draft matures January 31, 1931.

Your account has been credited with $4962.50, representing proceeds, particulars as follows:

Amount		$5,000.00
Discount 90 days @ 2%	$25.00	
Commission 1% p.a.	12.50	37.50
		$4,962.50

You mention that you have a draft reserve with us for $9,734.16. This figures covers the amount of your drafts Nos. 103009 and 103012 and the balance remaining on your Nos. 103006A and 103004, but evidently does not take into consideration your draft No. 103110 drawn on La Paz, Bolivia, for $11,031.14.

Awaiting your further requests, we are,

Yours very truly,

Assistant Cashier."

The witness' attention was then called to figures appearing upon a blackboard, and said witness testified therefrom as follows:

(Testimony of Homer E. Pope.)

Draft No. 103004 in the sum of $63,950. is one of the sight drafts on the two shipments to Birla Bros. disclosed by letters of [194] transmittal dated October 7, 1930. The same situation is true in respect to Draft 103006-A in the sum of $55,900.76. The other two drafts were 180 day drafts. The total of the two sight drafts was $119,850.76. The acceptances that were accepted and released aggregate $115,000.00. Deducting the $115,000.00 from the $119,850.76, a balance of $4,850.76 is left, based entirely and exclusively upon the two sight drafts and exclusive of the 180 day drafts. Between October 8, 1930, and October 13, 1930, draft No. 103009, in the sum of $2,442.40 was mailed on October 8, 1930, to Wells Fargo Bank & Union Trust Co., and a draft No. 103010, for $11,031.14, was mailed on October 9, and on October 11, draft No. 103012 for $2,441, was mailed. The total of these two small drafts, $2,442.40, and $2,441.00, plus the difference between $115,000.00 and $119,850.76, makes $9,734.16. That was the figure which was mentioned by me in my letter requesting the issuance to the Richfield Oil Company of an acceptance for $5,000.00. In the meantime, we had sent up the draft for $11,031.15. After receiving the letter of October 15, 1930, from Wells Fargo Bank & Union Trust Co. calling our attention to this additional draft, we sent a letter to the Wells Fargo Bank in response to said letter of October 15. Said letter was dictated by me.

(Testimony of Homer E. Pope.)

Plaintiff then offered in evidence a letter dated October 20, 1930, and said letter was received in evidence and marked Plaintiff's Exhibit 30. Said letter was in the words and figures as follows:

"October 20, 1930

Wells Fargo Bank and Union Trust Company,
Market at Montgomery,
San Francisco, California.

Dear Sir: Attention: Mr. E. Leuenberger,
Asst. Vice President. [195]

In talking with Mr. Gilstrap Saturday, he informed us that we might use our collection number 103010, your number 46843, on La Paz, Bolivia, as reserve against acceptances. Under these circumstances, would you please issue an acceptance for $10,000.00 to mature in 90 days.

In your letter of October 15th to our Mr. Pope, the due date on a $5,000.00 acceptance was given as January 31, 1931. We are in doubt as to whether this date is correct or whether it should have been January 13, 1931, since it is a 90 day acceptance. Will you please set us straight on this matter.

Your courtesy in this matter is appreciated.

Yours very truly,
G. P. LYONS, Comptroller."

The acceptance for $10,000 which we requested the bank in the letter of October 20 to issue was

(Testimony of Homer E. Pope.)
the acceptance based upon the La Paz draft for $11,031.14. We received a letter in response to our letter of October 20, 1930.

Plaintiff then offered in evidence a letter dated October 21, 1930, and said letter was received in evidence and marked Plaintiff's Exhibit 31. Said letter is in the words and figures as follows:

"October 21, 1930.

Richfield Oil Company of California,
555 South Flower Street,
Los Angeles, California.

Gentlemen:

In accordance with your letter of October 20, we executed 90 days acceptance for $10,000.00 and credited your account with the proceeds, $9925.00, as per credit memorandum herewith.

This acceptance will fall due January 19, 1931.

We have ear-marked same against your collection No. 46843 on La Paz, Bolivia.

Regarding acceptance of $5,000.00 advised in our letter of October 15: The maturity date should be January 13, 1931, and not January 31, 1931, as previously advised. Kindly pardon this oversight.

Yours very truly,

Assistant Vice President."

The credit memorandum shows the $10,000.00 acceptance executed. The discount was $50.00; the

(Testimony of Homer E. Pope.)

commission was $25.00, making a total of $75.00 and a credit of the proceeds of said $10,000.00 acceptance in the sum of $9925.00. [196]

Upon accepting these two subsequent acceptances the bank had accepted $130,000 of acceptances. I recall that a memorandum showing the issuance of the $10,000 acceptance had not been received. I wrote a letter to the bank with respect thereto, and received a response. This carbon copy of a letter written by me to the bank and the original letter received from the bank is the correspondence upon this subject.

Plaintiff then offered in evidence said letters and the same were received in evidence and marked Plaintiff's Exhibit 32. Said letters are in the words and figures as follows:

"October 27, 1930.

Wells Fargo Bank and Union Trust Co.,
Market at Montgomery Street,
San Francisco, California.

Attention—Mr. W. J. Gilstrap,
Assistant Cashier.

Dear Sir:

On October 20th our Mr. Lyons wrote you in regard to issuing an additional acceptance for $10,000.00 to mature in ninety days.

We have not received an advice of this acceptance, and are wondering if the letter has gone astray.

(Testimony of Homer E. Pope.)

Thanking you for your kidness in this matter, I am,

Yours very truly,
RICHFIELD OIL COMPANY
OF CALIF."

October 28, 1930.

Richfield Oil Company of California,
Los Angeles, California.

Gentlemen: Attention Mr. H. E. Pope.

Your letter of October 27 is received.

Apparently our letter of October 21, a copy of which we enclose, has gone astray. You will note that on that date we credited your account with $9925.00, representing proceeds of acceptance drawn for $10,000.

Statement showing details of discount is also enclosed.

Yours very truly,
W. J. GILSTRAP, Assistant Cashier."

I prepared a letter dated November 24, 1930, to the Wells Fargo Bank & Union Trust Co. [197]

Plaintiff then offered said letter in evidence and the same was received in evidence and marked Plaintiff's Exhibit 33. Said letter is in the words and figures as follows:

"November 24, 1930.

Wells Fargo Bank and Union Trust Company,
Market at Montgomery Street,
San Francisco, California.

Gentlemen:

Please issue for our account acceptances in the amount of $25,000.00. The enclosed accept-

(Testimony of Homer E. Pope.)

ance for $5,000.00, in addition to those you now hold for our account amounting to $20,000.00, will make up this total.

Will you be kind enough to issue these acceptances as of November 28th. This will give a reasonable allowance for delays in the remittance of draft payments.

Your courtesy is very much appreciated.

Yours very truly,

RICHFIELD OIL COMPANY
OF CALIFORNIA
G. P. Lyons, Comptroller."

There had already been issued $130,000.00 of acceptances and this $25,000.00 had increased the acceptances to $5,000.00 above the $150,000.00 specified in the acceptance agreement so I inclosed a draft to be accepted by the bank for $5,000.00.

Said witness testified further as follows:

I recall the telegram sent to Mr. Hall by Wells Fargo Bank & Union Trust Co. announcing that the Birla sight draft had been paid.

Plaintiff then offered in evidence said telegram and the same was received in evidence and marked Plaintiff's Exhibit 34. Said telegram was in the words and figures as follows:

"San Francisco Calif
26 927A 1930 Nov 26 AM 9 41

R. L. Hall
Richfield Oil Co of Calif

Our Calcutta correspondents state both Birla sight drafts Pd

WELLS FARGO BANK AND
UNION TRUST CO."

(Testimony of Homer E. Pope.)

Said witness testified further as follows:

I recall having received a letter from Wells Fargo Bank under date of November 28, 1930, stating that they had executed acceptances in the sum of $25,000.00. [198]

Plaintiff then offered in evidence a carbon copy of said letter and the same was received in evidence and marked Plaintiff's Exhibit 35. Said letter was in the words and figures as follows:

"November 28, 1930.

Richfield Oil Company of California,
Los Angeles, California.

Gentlemen: Attention Mr. H. E. Pope.

We refer to your letter of November 24 and our telephone conversation today.

In accordance with your request, we have executed acceptances in the amount of $25,000. and credited your account with $24,812.50, particulars as follows:

Amount of acceptances		$25,000.00
Discount 90 days @ 2%	$125.00	
Commission 1% p.a.	62.50	187.50
		$24,812.50

These acceptances mature February 26, 1931.

Yours very truly,

Assistant Cashier."

Said witness testified further as follows:

We received a letter from Wells Fargo Bank dated November 29, 1930.

(Testimony of Homer E. Pope.)

Plaintiff then offered in evidence said letter and the same was received in evidence and marked Plaintiff's Exhibit 36. Said letter is in the words and figures as follows:

"November 29, 1930.

Richfield Oil Company of California,
Los Angeles, California.

Gentlemen: Attention Mr. R. L. Hall.

In connection with your drafts Nos. 103006-A and 103004 on Birla Bros. Ltd. for $55,900.76 and $63,950.00, respectively, we confirm having had exchange of cables as follows:

Sent Nov. 25—'Cable status our collections 46831 and 46833 October eighth.'

Recd. Nov. 26—'Refer to your wire 25th of this month Both collections paid.'

Sent Nov. 26—'Our Calcutta correspondents to you state both Birla sight drafts paid.' [199]

For the cost of the above messages, we have debited your account with $8.76, as per enclosed memorandum.

Yours very truly,

E. LEUENBERGER,
Assistant Vice-President.
Assistant Cashier."

Said witness testified further as follows:

After the acceptance of the additional $5,000.00 draft, making in all $155,000 worth of acceptances, a request was made upon us by Wells Fargo Bank

(Testimony of Homer E. Pope.)

& Union Trust Co. for an additional acceptance agreement to cover the extra $5,000.

Plaintiff then offered in evidence a letter dated December 1, 1930, from Wells Fargo Bank & Union Trust Co. to Richfield Oil Company of California, and a letter from Richfield Oil Company of California to Wells Fargo Bank & Union Trust Co. dated December 3, 1930, and said letters were received in evidence and marked Plaintiff's Exhibit 37. Said letters are in the words and figures as follows:

"December 1, 1930.

Richfield Oil Company of California,
555 South Flower Street,
Los Angeles.

Gentlemen: Attention: Mr. H. E. Pope.

As your Acceptance Agreement covering the execution of acceptances by us against your documentary export bills calls for $150,000, we are enclosing another agreement for $5,000, to cover the acceptance for this amount executed by us November 28, in accordance with your letter of November 24.

Please sign and return this form to us.

Yours very truly,
C. B. CLEMO, Assistant Cashier."

(Testimony of Homer E. Pope.)

"December 3, 1930.

Wells Fargo Bank & Union Trust Co.
Market at Montgomery St.,
San Francisco, California.

Foreign Department—
Attention Mr. C. B. Clemo

Dear Sir: [200]

As requested in your letter of December 1st, we are enclosing the Acceptance Agreement which you asked for. You will notice that we have not dated the signatures. This was purposely done because we did not know whether the date should be the same as the acceptances or the actual date signed. The signatures were placed on this agreement December 2nd.

In the future we will forward these agreements with the acceptance issued.

Yours very truly,
RICHFIELD OIL COMPANY
OF CALIFORNIA."

Plaintiff then offered in evidence said acceptance agreement and the additional acceptance in the sum of $5,000 and the same were received in evidence and marked Plaintiff's Exhibits 38 and 39 respectively. Said acceptance agreement was exactly the same as that which was introduced in evidence and marked Plaintiff's Exhibit 16 with the exception that it was in the amount of $5,000 and dated November 28, 1930. Said acceptance in the sum of $5,000 was in the same form as those offered

(Testimony of Homer E. Pope.)

in evidence and marked Plaintiff's Exhibits 17, 18, 19 and 20.

Said witness testified further as follows:

The significance of the draft number on the drafts is that the first two figures indicate the month, the next two figures the year, and the last two the number of the draft drawn in the particular month. Thus Draft 103004 was the fourth draft drawn in October, 1930.

In my conversation with Mr. Gilstrap it was agreed that the acceptances were to be issued in multiples of $5,000.00. In other words, the minimum acceptance would be $5,000.00 and if acceptances were issued in excess of $5,000.00 they would have to be for $10,000.00, $15,000.00, $20,000.00 or $25,000.00. On October 8, 1930, $115,000.00 worth of acceptances were released by the bank. The two sight drafts, not taking into consideration the 180 day drafts which the bank refused to take, aggregated $119,850.76, one being for $63,950.00, and the other being for $55,900.76. Deducting the face value of the acceptances, to-wit, $115,000.00, from the [201] gross face value of the two drafts aggregating $119,850.76, left a surplus of $4850.76. In view of the fact that the minimum acceptance would have to be $5,000.00, no acceptance could be issued against that surplus of $4850.76. At the time Mr. Hall and I went to San Francisco and visited the bank, which was on October 6, 1930, we desired to obtain as many acceptances as were possible under

(Testimony of Homer E. Pope.)

the drafts and the maximum amount then obtainable was $115,000.00. We subsequently sent to San Francisco two drafts, one numbered 103009 for $2442.40, the other being numbered 103012 for $2441.00, making an aggregate which, together with the surplus on hand represented by the two large sight drafts mentioned, aggregated $9734.16. After we had mailed to the bank our letter of October 13, 1930, Plaintiff's Exhibit 28, the bank sent its response and issued a $5,000.00 acceptance, accepted October 15, 1930, which is Plaintiff's Exhibit No. 18. The draft referred to in the letter as numbered 103110 is incorrect. It should be 103010.

Plaintiff then offered in evidence a number of transmittal letters and drafts, and receipts of the Wells Fargo Bank & Union Trust Co. for said drafts, and said documents were received in evidence and marked Plaintiff's Exhibits 40 to 92 inclusive. Said transmittal letters were in identically the same form as those hereinabove set forth and marked Plaintiff's Exhibits 22, 23, 26 and 27, and covered drafts drawn upon various foreign customers of the Richfield Oil Company. The drafts were all in comparatively small amounts with the exception of that contained in Plaintiff's Exhibit 82, and were all drawn either at sight or for periods not in excess of sixty days, with the exception of that contained in Exhibit 82. All of said drafts were in substantially the same form as those hereinabove set forth as parts of Plaintiff's Exhibits

(Testimony of Homer E. Pope.)

22, 23, 26 and 27. Plaintiff's Exhibit 82 was a transmittal letter in the same form as [202] those hereinabove set forth and marked Plaintiff's Exhibits 22 and 23, and covered a sight draft drawn on Birla Bros. Ltd., Calcutta, India, in the sum of $11,107.50, and a time draft drawn at 180 days sight on Birla Bros. Ltd., Calcutta, India, in the sum of $23,607.50. These drafts contained in said Exhibit 82 were in substantially the same form as those hereinabove set forth as parts of Plaintiff's Exhibits 22 and 23. All of said transmittal letters with the exception of that contained in Plaintiff's Exhibit 52 requested Wells Fargo Bank & Union Trust Co. to forward the drafts to the bank's correspondent for collection. The transmittal letter in said Exhibit 52 omitted the words "for collection". Said transmittal letters and drafts were those which were deposited by Richfield Oil Company of California with Wells Fargo Bank & Union Trust Co. from October 9, 1930, until January 14, 1931. The receipts hereinabove mentioned were acknowledgments on the part of Wells Fargo Bank & Union Trust Co. of the deposit of the drafts above mentioned. The following is a list of the drafts covered by the Exhibits last mentioned:

(Testimony of Homer E. Pope.)

Exhibit No.	Date Deposited	Draft No.	Customer	Amount	Time
	1930				
40	Oct. 11	103012	Bueno y Cia	$2441.00	60 days
42	" 27	103024	A. S. Clark	1007.00	60 "
43	" 20	103023	Sociedad Automovilia	779.10	60 "
45	" 27	103025	Nottebohm Hermanos	583.00	sight
47	" 27	103027	Sociedad Automovilia	381.60	60 days
48	" 27	103028	Plesch y Cia	1204.78	sight
49	" 27	103026	Alvarez e Hyos.	2446.82	30 days
50	" 28	103029	Nissho Co. Ltd.	654.55	30 "
52	" 29	103030	Empresa Dean	1405.20	60 "
53	Nov. 5	113001	Limon Trading Co.	1208.40	60 "
55	" 18	113007	Plesch y Cia	1204.78	sight
57	" 18	113008	A. S. Clark	1007.00	60 days
58	" 18	113009	Limon Trading Co.	5256.60	60 "
59	" 19	113010	J. C. Spedding	1804.01	30 "
60	" 19	113011	Nottebohm Hermanos	103.12	sight [203]
61	" 19	113012	Boetteger Trepp y Cia	$1466.25	sight
62	" 21	113013	Alvarez e Hijos	2466.82	30 days
63	" 21	113014	Nissho Co.	1547.50	sight
64	" 21	113017	J. C. Spedding	7237.35	30 days
65	" 22	113018	Miguel Duevar	641.25	sight
66	" 24	113019	Nottebohn Hermanos	291.50	"
71	" 24	113020	Raymundo Diaz	1200.00	"
72	" 24	113021	Empresa Dean	2237.66	60 days
73	" 27	113023	Nissho Co.	881.13	30 days
74	Dec. 22	123007	A. S. Clark	1007.00	60 "
75	" 23	123008	Alvarez e Hijos	2446.82	30 "
76	" 23	123009	Limon Trading Co.	3418.90	60 "
77	" 23	123010	Empresa Dean	1266.29	60 "
78	" 27	123013	J. C. Spedding	2702.66	30 "
79	" 27	123014	Ricardo Velazquez	1219.00	60 "
80	" 27	123015	Botteger Trepp y Cia	2692.99	sight
	1931				
81	Jan. 8	13103	Ito Bergonzoli	53.45	"
82	" 8	13106	Birla Bros.	11107.50	"
82	" 8	13107	Birla Bros.	23607.50	180 days
83	" 15	13108	Nissho Co.	1197.81	30 "

(Testimony of Homer E. Pope.)

(The dates listed under the heading "Date Deposited" in the foregoing schedule refers to the date upon which drafts were mailed from Richfield Oil Company to defendant. All drafts were received by defendant one day later.)

Said witness testified further as follows:

There came a time when the acceptances had to be paid and the payment of the acceptances was the subject of some correspondence between the Bank and Richfield Oil Company. When drafts were collected by the Bank and the proceeds applied in payment of acceptances, advices were sent by the Bank to Richfield Oil Company. It frequently occurred that certain of the drafts under the acceptances would be paid in advance of maturity of the acceptances and the money applied in anticipation of the acceptances.

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to Richfield Oil Company of California, dated December 16, 1930, and said letter was received in evidence and marked Plaintiff's Exhibit 93. Said letter referred to drafts numbered 103004, (Plaintiff's Exhibit 22) and 103006a (Plaintiff's Exhibit 27), drawn on Birla Bros. Ltd. at sight, for $63,950 and $55,900.76 respectively, and stated that the proceeds of these drafts [204] had been received. Said letter further stated that the total amount of said drafts less a sum deducted for collection charges was being applied in anticipation of maturing acceptances. This total amount so stated to have been applied was $119,626.05.

(Testimony of Homer E. Pope.)

Said witness testified further as follows:

This was the first letter received by the Richfield Oil Company from the bank indicating that the bank had received the proceeds of any of these drafts. To my knowledge, between the date upon which the first four drafts of Birla Bros., Ltd. were deposited, that is, the two sight drafts and the two 180 day drafts, up to the time of the receipt of this letter, I had not received any communication at all from the bank relating to the two 180 day sight drafts or either of them, excepting the correspondence that has been introduced in evidence.

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to Richfield Oil Company of California, dated January 12, 1931, and the same was received in evidence and marked Plaintiff's Exhibit 94. Said letter stated that a credit memorandum was enclosed showing $6.87 credited to the account of Richfield Oil Company and that this sum represented interest on an amount held in anticipation of acceptances for $5,000 due on the following day.

Said witness testified further as follows:

The interest credit of $6.87 was interest to which the Richfield Oil Company was entitled upon the collections which were received by the bank and applied in anticipation of the maturing of the $5,000 acceptances. That interest was actually credited by the bank to the commercial account of Richfield Oil Company and not retained by the bank.

(Testimony of Homer E. Pope.)

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to Richfield Oil Company of California, and said letter was received in evidence and marked Plaintiff's Exhibit 95. Said letter was in the words and figures as follows:

"January 3, 1931.

Enclosed is our usual advice informing you that your collection No. 103010 for $11,031.14 has been paid. We have applied the net proceeds, amounting to $10,991.07 in anticipation of our acceptances executed for your account. [205] For your information, our acceptances for your account are as follows:

$115,000	due January	6
5,000	" "	13
10,000	" "	19
25,000	" February	26

against which we have received payment (proceeds of collections) as follows:

$119.626.05	December 10
10,991.07	December 31

Yours very truly,"

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to Richfield Oil Company of California, and said letter was received in evidence and marked Plaintiff's Exhibit 96. Said letter was in the words and figures as follows:

(Testimony of Homer E. Pope.)

"January 6, 1931.

We refer to acceptances executed by us October 8, totaling $115,000. These acceptances matured today.

As already informed you we aplied $119,626.05 representing the proceeds of collections on December 16, value December 10, in anticipation of maturing acceptances.

As per the enclosed memorandum we have credited your account $124.58, representing interest due you on $115,000. from December 10, to and including, January 4. These acceptances, as you probably know, are payable by you one day prior to maturity.

Interest will be adjusted on the remainder of $4,626.05 on January 13, when an acceptance for $5,000 matures.

Yours very truly"

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. C. McDuffie, Receiver, together with advices and bill attached thereto, and said documents were received in evidence and marked Plaintiff's Exhibit 97. Said letter was in the words and figures as follows:

"January 26, 1931.

We refer to Richfield Oil Company of California collection No. 113014 drawn on Nissho Co. Ltd. for $1547.50. This collection has been paid and the total proceeds amount to [206]

(Testimony of Homer E. Pope.)

$1560.58 as per memorandum attached. This amount, as well as interest amounting to $5.00 as per statement attached, has been applied in anticipation of acceptances for $25,000. due February 26.

Yours very truly"

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. C. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 98. Said letter is in the words and figures as follows:

"January 28, 1931.

We refer to Richfield Oil Company of California draft No. 103009 drawn on Ricardo Velazquez for $2,442.40. This draft has been paid and the total proceeds amount to $2,484.49, as per memorandum attached.

This sum has been applied in anticipation of our acceptance for $25,000. due February 26.

Yours very truly"

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. McDuffie, Receiver, and said letter was received in evideence and marked Plaintiff's Exhibit 99. Said letter was in the words and figures as follows:

"February 2, 1931.

We refer to your draft No. 113013 drawn on Rafael Alvarez Le Hijos, for $2,446.82.

(Testimony of Homer E. Pope.)

This draft has been paid and the total proceeds amount to $2,443.77, as per memorandum attached. This amount has been applied in anticipation of acceptances for $25,000, due February 26.

Yours very truly"

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 100. Said letter was in words and figures as follows:

"February 3, 1931.

We refer to draft No. 113001 of the Richfield Oil Company of California.

This draft has been paid and the total proceeds amount to [207] $1194.81, as per memorandum attached. This amount has been applied in anticipation of acceptances for $25,000, due February 26.

Yours very truly"

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co., to W. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 101. Said letter was in words and figures as follows:

"February 4, 1931.

We refer to draft No. 113023 of the Richfield Oil Company of California;

This draft has been paid and the total proceeds amount to $889.88, as per memorandum

(Testimony of Homer E. Pope.)

attached. This amount has been applied in anticipation of acceptance for $25,000. due February 26.

Yours very truly"

Plaintiff then offered in evidence a letter dated February 4, 1931, from Wells Fargo Bank & Union Trust Co. to W. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 102. Said letter stated that a debit memorandum of the sum of $150.20 charged against Richfield Oil Company of California was in error and that the sum had already been collected from Richfield Oil Company of California.

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 103. Said letter was in the words and figures as follows:

"February 13, 1931.

We refer to drafts Nos. 123007, 113012 and 103030 of Richfield Oil Company of California.

These drafts have been paid and the total proceeds amount to $1,019.82, $1,460.08 and $1,-396.27, respectively, as per memorandum attached. These amounts have been applied in anticipation of acceptance for $25,000. due February 26.

Yours very truly"

(Testimony of Homer E. Pope.)

Said witness testified further as follows: [208]

These short time drafts which were deposited with the bank matured at different times. Some of the drafts later deposited were collected previous to the collection of drafts earlier deposited. In other words, the drafts themselves were not collected in the order in which they were deposited. As the proceeds would come in the bank applied them first to the acceptances in the sum of $115,000. and then next to the acceptances as they were issued, taking into consideration the date of maturity of the acceptances, so that following this procedure the proceeds of drafts deposited after earlier drafts had been deposited would be applied to the acceptances coming due and maturing first in point of time.

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 104. Said letter was in the words and figures as follows:

"March 14, 1931.

We refer to drafts Nos. 113010, 113017 and 113007 of the Richfield Oil Company of California.

These drafts have been paid and the total proceeds amount to $1,829.07, $7,377.65 and $1,221.76 respectively, as per memorandum attached. These amounts have been applied in anticipation of acceptance for $25,000. due February 26.

Yours very truly"

(Testimony of Homer E. Pope.)

Plaintiff then offered in evidence a letter dated February 21, 1931, from Richfield Oil Company of California to Wells Fargo Bank & Union Trust Co., and said letter was received in evidence and marked Plaintiff's Exhibit 105. Said letter stated that a bank acceptance for $1600 was enclosed and also an acceptance agreement. Said letter further stated that these documents were forwarded to make good a balance due of $1,499.70 on the $25,000 of bank acceptances to come due on February 26, 1931, requesting that if sufficient funds were received from collec- [209] tions of drafts, the documents be returned to Richfield Oil Company.

Plaintiff then offered in evidence a letter from Richfield Oil Company of California to Wells Fargo Bank & Union Trust Co., and said letter was received in evidence and marked Plaintiff's Exhibit 106. Said letter was in the words and figures as follows:

"March 3, 1931.

Wells Fargo Bank & Union Trust Co.
San Francisco, California.

Dear Sirs: Attention: Mr. Gilstrap.

Referring to your letter of February 26th, advising us of payment of certain drafts totaling $9260.81, less certain charges amounting to $11.53, leaving a balance of $9249.28 from which you are taking $1499.70 to meet the balance due on acceptances February 26th, leaving the sum of $7749.58 to be credited to our ac-

(Testimony of Homer E. Pope.)

count, and referring to your telegram of January 16th, I beg to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15th, 1931, to the credit of William C. McDuffie, Receiver. I will therefore appreciate it if you will kindly credit the remainder of the proceeds as mentioned above, $7,-749.58, to the credit of Richfield Oil Company of California, William C. McDuffie, Receiver, and advise as soon as this transfer has been made.

Yours very truly,
RICHFIELD OIL COMPANY,
OF CALIFORNIA
William C. McDuffie, Receiver."

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. C. McDuffie, Receiver, together with memoranda attached thereto and said letter was received in evidence and marked Plaintiff's Exhibit 107. Said letter and memoranda attached was in the words and figures as follows:

"February 26, 1931.

Enclosed are advices of payment of your drafts Nos. 113009, 113018 and 123008. The proceeds amount to $4666.98, $650.06 and $2,-443.77 respectively.

We have also received a partial payment of

(Testimony of Homer E. Pope.)

$1500.00 to apply on your draft No. 103012, which after deduction of all charges, as per statement attached, leaves a net amount of $1488.47.

From the four amounts above mentioned, the sum of $1499.70 has been taken to meet the balance due on acceptances maturing today. The remainder of the proceeds, totalling $7749.58, we are holding in accordance with the notice given you by our wire of January 16. [210]

We are returning herewith the acceptance form and the acceptance agreement which you forwarded with your letter of February 21 and which we shall not have to use.

Yours very truly,
W. J. Gilstrap, Assistant Cashier."

"San Francisco, Calif., February 24, 1931.

WELLS FARGO BANK & UNION TRUST CO.
Market at Montgomery
San Francisco

Account of William C. McDuffie, Receiver,
Richfield Oil Co. of California,
555 South Flower St.,
Los Angeles, California.
Proceeds:

(Testimony of Homer E. Pope.)

Part payment on your collection #103012 our #6945 as per your letter of January 24, 1931, Face amount of draft		$2441.00
Part Payment		1500.00
Balance		$ 941.00
Less correspondent charges	$9.65	
Less our charges	1.88	11.53
		$1488.47

Said witness testified further as follows:

I kept records in my office showing the deposit of these drafts with the bank. I kept little pencil memos as records showing what particular drafts were, according to my understanding, deposited under the acceptances. I did not keep records themselves but used my correspondence showing the proceeds of the drafts as they were collected. I took the dates the drafts were paid and I made pencilled memorandums as to the net proceeds from the correspondence received from the bank.

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. C. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 108. Said letter was in words and figures as follows:

"March 5, 1931.

We refer to your letter of March 3 regarding funds received representing proceeds of collections.

(Testimony of Homer E. Pope.)

In accordance with your request, we are crediting the account of William C. McDuffie, Receiver, Richfield Oil Company of California, with the sum of $7749.58. [211]

We are also crediting this account with $11,-082.51, representing proceeds of collection No. 13106 of the Richfield Oil Company of California, particulars as per memorandum attached.

Yours very truly,"

Plaintiff then offered in evidence a telegram from Richfield Oil Company of California to Wells Fargo Bank & Union Trust Co., and said telegram was received in evidence and marked Plaintiff's Exhibit 109. Said telegram was in the words and figures as follows:

"Los Angeles Calif 248P Mar 2 1931

WFBAUTCO

Attn W. J. Gilstrap

Please repeat telegram dated January sixteenth mentioned in your letter to Lyons of February twenty sixth please answer immediately

RICHFIELD OIL CO OF CALIF

POPE."

Plaintiff then offered in evidence a telegram from Wells Fargo Bank & Union Trust Co. to W. C. McDuffie, Receiver, and said telegram was received

(Testimony of Homer E. Pope.)

in evidence and marked Plaintiff's Exhibit 110. Said telegram was in the words and figures as follows:

"Mar. 2 1931

Our telegram January sixteenth addressed to Mister McDuffie read as follows quote replying telegram we are willing to restore into your name as receiver Richfield's balance in checking account provided we are notified by you that all company's banks have taken similar action stop we are holding certain collections as security for acceptances please understand that we continue to reserve all our rights for bankers lien against these collections unquote."

Said witness testified further as follows:

When the sum of $1499.70 was paid as set forth in the letter marked Plaintiff's Exhibit 107, all of the $25,000 worth of acceptances were paid in full, they having matured on February 26, 1931. Before release of acceptances was requested by the bank, Richfield Oil Company had on deposit with the bank a sufficient number of short time drafts exceeding to some extent the total amount of the acceptances. After February 26, 1931, no acceptances were obtained by Richfield Oil Company from Wells Fargo Bank & Union Trust Co. or requested from the bank.

Draft No. 13106 was deposited with the bank on January 8th [212] or January 9th, 1931. This was a sight draft. That particular draft is the draft

(Testimony of Homer E. Pope.)

referred to in the concluding paragraph of Plaintiff's Exhibit 108, in which it is said:

> "We are also crediting this account with $11,082.51, representing proceeds of collection No. 13106 of the Richfield Oil Company of California, particulars as per memorandum attached."

The sum of $7,749.58 which represented the balance of the proceeds of the drafts collected by the bank, a part of which, the sum of $1,499.70, was applied in satisfaction of the $25,000 acceptances, was actually credited to the account of the Receiver.

Plaintiff then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to W. C. McDuffie, Receiver, together with memorandum attached thereto, and the same were received in evidence and marked Plaintiff's Exhibit 111. Said letter stated that the bank had received a number of anticipated payments on the acceptance of $25,000 maturing on February 26, 1931, and that an interest credit of $18.17 was being allowed on these payments. Said memorandum was a tabulation of the interest allowed.

Said witness testified further as follows:

The interest referred to in this memorandum is the interest which became due because of anticipated payments on acceptances and represents the proceeds of drafts collected, the principal of which proceeds was applied on account of the acceptances and

(Testimony of Homer E. Pope.)

in anticipation of the maturity of the acceptances.

The proceeds of the drafts deposited before the appointment of the Receiver and collected by the bank after the appointment of the Receiver and between the 26th day of February, 1931, and the early part of May, 1931, were deposited to the account of the Receiver and used by the Receiver.

Plaintiff then offered in evidence a letter dated April 22, 1931, from Wells Fargo Bank to W. C. McDuffie, Receiver, and the same was received in evidence and marked Plaintiff's Exhibit 112. Said letter referred to the fact that Richfield Oil Company desired to [213] have cancelled the customary rebate of four per cent per annum on drafts of Birla Bros. paid before maturity, and requested information as to whether Richfield Oil Company would communicate directly with Birla Bros. Ltd. or desired the bank to do so through its correspondent.

Plaintiff then offered in evidence a letter dated May 7, 1931, from William C. McDuffie, Receiver of Richfield Oil Company of California, to Wells Fargo Bank & Union Trust Co., and said letter was received in evidence and marked Plaintiff's Exhibit 113. Said letter stated that Richfield Oil Company had followed the bank's suggestion and had written directly to Birla Bros. regarding the four per cent rebate.

Plaintiff then offered in evidence a letter dated May 5, 1931, from Wells Fargo Bank & Union

(Testimony of Homer E. Pope.)

Trust Co. to William C. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 114. Said letter stated that no reply had as yet been received to the letter which is Plaintiff's Exhibit 112.

Plaintiff then offered in evidence a letter dated May 8, 1931, from William C. McDuffie, Receiver of Richfield Oil Company of California, to Wells Fargo Bank & Union Trust Co., and said letter was received in evidence and marked Plaintiff's Exhibit 115. Said letter requested the bank to cable to its correspondent at Calcutta, India, to remit the proceeds of draft No. 103005 for $63,950.00 and draft No. 103006-B for $55,900.76, both of which drafts were drawn on Birla Bros. Ltd.

Said witness testified further as follows:

Draft No. 103005 for $63,950.00, was the draft next issued after draft No. 103004, and represented the same amount of money and was a 180 day sight draft which was deposited with the bank on or about the 8th of October, 1930. Draft No. 103006-B was the counterpart of draft No. 103006-A, and was for $55,900.76, and represented the 180 day draft likewise deposited with the drafts on said October 8, 1930. [214]

Between the date upon which those drafts were deposited with the bank and the 8th day of May, 1931, the bank had not communicated with me or the Richfield Oil Company to the effect that they

(Testimony of Homer E. Pope.)

were claiming or claimed a bankers lien or any other sort of lien on these two drafts.

Plaintiff then offered in evidence a letter dated May 9, 1931, from Wells Fargo Bank & Union Trust Co. to William C. McDuffie, Receiver, and said letter was received in evidence and marked Plaintiff's Exhibit 116. Said letter stated that in accordance with the request of the Richfield Oil Company the bank had cabled their Calcutta correspondent referring to the draft of Richfield Oil Company, No. 43110, drawn on Birla Bros. Ltd. for $45.035.47, instructing said correspondent to transfer the proceeds of the draft by cable when paid. (This draft is not in issue in the present case.)

Cross Examination

At the present time I am a salesman for Richfield Oil Company. I am no longer with the Foreign Department. I was in the Foreign Department from September, 1929, until November, 1931. I was on the financial side of the Foreign Department rather than on the export business side, and had more concern about the financial arrangements than about other business of the Foreign Department. Mr. Hall was Manager of the Foreign Department and was generally in charge of the work of the Foreign Department.

I came to San Francisco once to see members of the Wells Fargo Bank. That was in the early part of October, 1930, and after I had talked with Mr.

(Testimony of Homer E. Pope.)

Hall about his arrangements with the Wells Fargo Bank. Mr. Hall asked me to come, the purpose of my trip being educational since I was not familiar with the new method of handling foreign collections proposed at that time. I went there with Mr. Hall to learn about that business. I had with me the so-called acceptance agreement given to me by Mr. Hall. I believe Mr. [215] Hall in handing me this acceptance agreement said something to the effect that this was the arrangement with which I was to familiarize myself. I will not state positively that he said this was the arrangement under which drafts were to be deposited with Wells Fargo Bank, because I don't remember.

Up to that time we had been discounting drafts with the Security First National Bank of Los Angeles. After that, I don't remember that we discounted any more drafts with the Security Bank, but we did deposit drafts with the Security Bank for collection. Approximately $300,000 of the amount so collected was turned back subsequent to the receivership.

I do not remember any discussion with the Wells Fargo Bank & Union Trust Co. about a revolving credit or a continuous credit. I do not remember Mr. Hall telling me that the bank had granted a credit to Richfield Oil Company of $150,000 on bankers acceptances and that this was to be a continuing credit or a revolving credit to be covered by one agreement. This was not my understanding of the trans-

(Testimony of Homer E. Pope.)

action. I had no discussion with Mr. Hall about it. To my knowledge, a revolving credit is a credit with a stipulated limit but its continuance is indefinite until cancelled by the other party. It is my understanding that after we had issued the initial $150,000 of bank acceptances which we brought up it would be necessary to make out a new acceptance agreement. I cannot remember any one telling me that. I was not familiar with these transactions to any extent before I came to the bank in the early part of October and the whole thing was strange to me.

The first time I saw this acceptance agreement, Plaintiff's Exhibit 16, was a few days before we came up to San Francisco. I did not discuss its contents with any one. I did not make any in- [216] quiry as to why there were blanks in the agreement. I believe that subject came up during our conversation with Mr. Gilstrap. To the best of my memory I believe something of this nature was said by Mr. Gilstrap: "As you will be depositing acceptances from time to time under this arrangement and drafts under this arrangement, all of which you cannot identify now, it is impossible to fill in those blanks at the present time." We could not give by number and reference on October 6th or 7th drafts that we would deposit on October 10th or 12th. But none the less it might be that drafts of October 10th or 12th were intended to apply under the agreement.

(Testimony of Homer E. Pope.)

As I remember it, something was said to the effect that reference to specific drafts was left blank in the acceptance agreement in order to provide for the deposit of drafts in the future thereunder, the numbers and descriptions of which were at the time of the execution of the agreement unknown. I don't remember anything having been said to the effect that the reason for the blanks in the agreement was to avoid the necessity of a new acceptance agreement every time an acceptance was issued against certain drafts.

(The foregoing testimony, commencing with the words "As I remember it something was said" was objected to by counsel for complainant on the ground it was incompetent, irrelevant and immaterial, and an attempt by parol to vary the terms of the acceptance agreement. Objection was overruled and exception noted.)

There were two acceptance agreements executed between the Richfield Oil Company and the Wells Fargo Bank, said agreements being Plaintiff's Exhibit 16 and a further acceptance for $5,000 being Plaintiff's Exhibit 38. To the best of my knowledge there was also an agreement that the 180 day drafts would be accepted for collection only and not be used as a basis for the issuance of acceptances. The Richfield Oil Company was only required to deposit sufficient drafts, the net proceeds of which would satisfy the amount of the bank acceptances. We

(Testimony of Homer E. Pope.)

deposited with the Wells Fargo [217] Bank drafts in excess of $155,000. The total amount of drafts exclusive of the drafts which the Wells Fargo Bank sought to exercise its rights against amounted to $197,390 according to my computation. With the exception of those drafts against which the Wells Fargo Bank sought to exercise its rights, there were a very few drafts for a very slight amount in excess of 90 days. They amounted to about $3,000 or $4,000 only. Excluding the drafts of a maturity in excess of 90 days, the total amount of drafts deposited with the Wells Fargo Bank between October 1, 1930, and January 15, 1931, amounted to approximately $195,000. I would not say that all of them were deposited under the acceptance agreement. The way in which I differentiated between drafts that were deposited under the acceptance agreement and drafts that were not deposited under the acceptance agreement were as follows: when I figured up my drafts at the time I requested the issuance of bank acceptances, I would have to have at that time enough drafts deposited at Wells Fargo Bank, the proceeds of which would pay promptly the bank acceptances.

Draft No. 103012 was paid in partial payments. The first payment was made on the 24th of February. I should say that in all probability these proceeds were used to make a part payment on the last $25,000 worth of acceptances issued.

I am quite positive that the initial $115,000 worth of acceptances were issued only against drafts Nos.

(Testimony of Homer E. Pope.)

103004 and 103006a, totalling $119,850.76. My understanding was that the $115,000 of acceptances were not issued against drafts Nos. 103005 and 103006b, the two companion 180 day drafts that accompanied drafts Nos. 103004 and 103006a. My testimony now is that the 180 day drafts were to be kept separate and were collections only. The signature on the letter which you hand me is that of G. P. Lyons, Comptroller of the Richfield Oil Company. The initials "R. L. H." on this letter are [218] Mr. Hall's.

Defendant then offered in evidence a letter from Richfield Oil Company of California to Wells Fargo Bank & Union Trust Co., and the same was received in evidence and marked Defendant's Exhibit "A". Said letter is in the words and figures as follows:

"October 7, 1930.

E. Leuenberger, Asst. Vice-President,
Wells Fargo Bank & Union Trust Company,
Montgomery & Market Streets,
San Francisco, California.

Dear Sir:

We are sending by Mr. Hall, documents covering a shipment to Birla Brothers, Ltd., Calcutta, India. Will you please release against this shipment $115,000.00 worth of acceptances made payable at ~~120~~ 90 days sight.

R.L.H.

Yours very truly,

G. P. LYONS
Comptroller"

(Testimony of Homer E. Pope.)

(Originally this letter stated that the acceptances were made payable at 120 days sight. This was scratched out and changed to 90 days, and initialed by R. L. Hall.)

With reservations, I should say that Plaintiff's Exhibits 22 and 23 are the letters of transmittal and the shipping documents referred to in the letter of October 7th which has just been marked Defendant's Exhibit "A", my reservations being that due to our understanding with Mr. Gilstrap and our conversation, the documents that we had reference to with respect to the issuance of the $115,000 worth of bank acceptances were the sight drafts. That is my conclusion and voluntary statement now. I would say that the documents referred to in the letter of October 7th, Defendant's Exhibit "A", reading: "We are sending by Mr. Hall documents covering a shipment to Birla Bros. Ltd., Calcutta, India", are the documents referred to in the letters of transmittal of the same date which have been marked Plaintiff's Exhibits 22 and 23. [219]

It was my understanding that the advance of $115,000 was to be made against drafts.

During the course of the conversation at the Wells Fargo Bank, there was some discussion as to the financial responsibility of Birla Bros. Mr. Hall spoke very highly of Birla Bros., saying that they always met their obligations to us promptly. Mr. Gilstrap showed us a cable from Calcutta, India.

(Testimony of Homer E. Pope.)

Defendant then offered in evidence a telegram from Netherlands Trading Society, Calcutta, India, to Wells Fargo Bank & Union Trust Co., and said telegram was received in evidence and marked Defendant's Exhibit "B". Said telegram was in code but was decoded on the same paper. The decoded part was in the words and figures as follows:

> "Referring your wire of the first of this month referring your wire of the fourth of this month our reply delayed account holiday we are informed confidentially (that) limited company paid up capital rupee 5,000,000 respectable but speculative reported have suffered severe losses recently.
>
> Netherlands Trading Society, Calcutta."

Said witness testified further as follows:

There was a discussion about this telegram by Mr. Gilstrap in my presence and he said it was not a satisfactory credit report. This came up during the discussion as to the 180 day drafts and it was related to our 180 day drafts on Birla Bros. We wanted to know whether the bank would take into consideration as a basis for their acceptances the 180 day paper on Birla Bros., as well as the sight paper. I don't remember whether either Mr. Gilstrap or Mr. Leuenberger said that this credit report on Birla Bros. was not good enough for the bank to advance for the whole amount of the shipment. As I remember the discussion, Mr. Hall and I were

(Testimony of Homer E. Pope.)

trying to raise all the money that we could on the Birla Bros. respective shipments and we asked Mr. Gilstrap if he could not issue acceptances against the whole shipment and he said that he could not because the time of the 180 day drafts was too long to be used as a basis for bankers acceptances and that it would not be considered prime paper. I believe he also did at that time [220] bring up the discussion of the credit standing of Birla Bros. The part of the conversation as I remember it relating to that was that the 180 day drafts, as I understood it, were definitely out because they were too long. It is my understanding, gathered from that conversation, that prime commercial paper depends upon the maturity date and that there cannot be prime commercial paper for 180 days.

I believe that Mr. Gilstrap and Mr. Leuenberger said: "We cannot use as a basis for the amount of your acceptances the 180 day paper on Birla Bros." They did not tell me, as I remember it, that they waived the security of that paper because I do not believe that came into the discussion.

The practice of transmitting drafts in the same form of letter as that shown in Plaintiff's Exhibits 24 and 25 continued throughout the entire series of transactions. Referirng to Plaintiff's Exhibits 40 to 92, in each instance a draft was deposited with the letter and shipping documents were forwarded with the letter of transmittal, and thereafter the bank issued its receipt to the Richfield Oil Company for these items.

(Testimony of Homer E. Pope.)

The Wells Fargo Bank charged a collection fee for the collection of each draft deposited by the Richfield Oil Company with the Wells Fargo Bank subsequent to my visit of October 6, 1930, and up to the time of the appointment of the Receiver. In computing the charge, it was made in accordance with the amount on the face of the draft and was some percentage of the amount of the face of the draft.

The witness' attention was then called to a document which had previously been marked Plaintiff's Exhibit 25 for identification. With the consent of counsel for defendant, plaintiff then introduced at that time said document in evidence and the same was received in evidence and marked Plaintiff's Exhibit 25. This document was a tabulation of the drafts deposited by Richfield Oil Company with [221] Wells Fargo Bank from October 6, 1930, until January 15, 1931, and was substantially the same as that hereinbefore set forth with respect to Plaintiff's Exhibits 40 to 92, with the exception that it included the date that each draft was due in the foreign country and the date upon which it was ultimately paid, and also included the four Birla Bros. drafts, Nos. 103004, 103005, 103006a and 103006b. (It was stipulated that since this document was prepared in contemplation of the trial of this action, the same was to be used solely for purposes of illustration and was not to be binding upon defendant.)

(Testimony of Homer E. Pope.)

Said witness testified further as follows:

Draft No. 103024 was returned to the Richfield Oil Company without having been collected, the reason being that the ship that was to pick up the goods covered thereby did not do so. The same thing is true of draft No. 103028.

The sum of $169,707.81 represented the total face amount of the drafts excluding the two 180 day drafts drawn on Birla Bros. and the two drafts that were returned, which were deposited with the Wells Fargo Bank up to and including the 24th day of November, 1930.

Drafts Nos. 103004 and 103006a, which were the two sight Birla Bros. drafts deposited on October 7, 1930, totalled $119,850.76, and on said day $115,000 worth of acceptances were issued and these were included in the $150,000 of acceptances which I brought up to the bank with me on October 6th. Deducting $115,000 from $119,850.76 leaves $4,-850.76. The next draft to be deposited was No. 103009 for $2,442.40. Draft No. 103012 for $2,441 was also deposited, but not next in order. Addition of the two last named figures to the figure of $4,850.76 makes a total of $9,734.16. This is the same figure which appears in Plaintiff's Exhibit 28, and [222] this was my understanding of the so-called draft reserve which we had at that time. It is hard to say where I first learned of the expression "draft reserve". It may be that that was our own method of explaining the situation.

(Testimony of Homer E. Pope.)

The $5,000 acceptance was issued subsequent to the receipt of the letter marked Plaintiff's Exhibit 28. In the letter marked Plaintiff's Exhibit 29, reference is made to the fact that we had forgotten to include draft No. 103010. Deduction of the sum of $5,000 from $9,734.16 leaves $4,734.16, which exclusive of Draft No. 103010 according to our understanding constituted the so-called draft reserve as of that time. Then by Plaintiff's Exhibit 29 there was called to our attention the fact that we had an additional so-called reserve of $11,031.14, represented by Draft No. 103010. This made our draft reserve at that time $15,765.30. On October 20, we wrote our letter marked Plaintiff's Exhibit 30, requesting the issuance of acceptances for $10,000. The letter from the bank marked Plaintiff's Exhibit 31, indicated that the $10,000 acceptance dated October 20th and maturing January 19, 1931, was issued. Subsequent to this, there were deposited a considerable number of drafts. Excluding the two returned drafts, Nos. 103024 and 103028, and including those drafts deposited from October 20, 1930, to November 24, 1930, there were deposited drafts in the face amount of $33,932.51.

Our letter marked Plaintiff's Exhibit 33, contains our instructions to the bank asking for the issuance of a final amount of $25,000 worth of acceptances. As evidenced by Plaintiff's Exhibit 35, there were issued the $25,000 worth of acceptances. As against the total amount of acceptances issued,

(Testimony of Homer E. Pope.)

there was a total of $169,707.81 face value of drafts deposited excluding the two 180 day drafts and the returned drafts. The acceptances of the Richfield [223] Oil Company were not to be issued against all of these drafts. There were one or two drafts as I remember it, the proceeds of which would not have arrived in San Francisco on time. The first draft under that heading was draft No. 103027 in the amount of $381.60. The next one was draft No. 113021 in the amount of $2,237.66. The next draft under that heading was No. 103025 for $583, the proceeds of which had already arrived in San Francisco prior to November 24, 1930. The total of these drafts amounts to $3,202.26. Deduction of that figure from the gross figure of $169,707.81, makes $166,505.55. Therefore, up to and including the 24th day of November, 1930, and to and including the date when the last acceptance was issued, there had been deposited with the Wells Fargo Bank drafts of a face value of $166,505.55, which, according to my understanding, were to be used as the basis of acceptances.

The net proceeds of the two Birla Bros. sight drafts, in the sum of $119,626.05, were on or about December 16, 1930, applied in anticipation of the acceptances which were thereafter to mature. These were the first two drafts paid and applied against acceptances. The next draft paid and applied against acceptances was draft No. 103010, as appears from Plaintiff's Exhibit 95. The next draft

(Testimony of Homer E. Pope.)

paid and applied against acceptances was draft No. 113014, as appears from Plaintiff's Exhibit 97. Draft 103009 was the draft next paid and applied against acceptances, as appears from Plaintiff's Exhibit 98. As appears from Plaintiff's Exhibit 99, draft 113013 was the next draft paid and applied against acceptances. Draft No. 113001, referred to in Plaintiff's Exhibit 100 was the next draft paid and applied against acceptances. Subsequent to this, drafts were paid and applied against acceptances in the following order: No. 113023, referred to in Plaintiff's Exhibit 101; drafts Nos. 123007, 113012 and 103030, referred to in Plaintiff's Exhibit 103; drafts Nos. 113010, 113017 and 113007, referred to in Plaintiff's Exhibit 104. [224]

After the payment of the drafts referred to in Plaintiff's Exhibit 104, the sum of $1,499.70 remained due as not having been paid in anticipation of the acceptances. For this amount we sent our letter marked Plaintiff's Exhibit 105 containing a bank acceptance for $1,600, payable at 40 days sight and an acceptance agreement. These documents were subsequently returned to us. The bank had not previously written and asked us for this. The drafts next paid and applied to acceptances were drafts Nos. 113009, 113018, 123009 and 103012, all referred to in Plaintiff's Exhibit 107. From the proceeds of these drafts last mentioned, the balance of the money due under the acceptances was paid.

(Testimony of Homer E. Pope.)

The sum of $1,499.70 was taken from the total sum received in the collection of the drafts last mentioned, but this sum was not allocated against any particular draft.

In the application of these draft proceeds against the acceptances they were paid in anticipation of the maturity of the acceptances. In other words, the acceptances had 90 days to run and when proceeds were received and applied by the bank it was merely an anticipation of the maturity of the acceptances.

The two Birla Bros. drafts, Nos. 13,107 and 13,106, one of which is the subject matter and part of this action, accompanied our letter dated January 8, 1931, marked Plaintiff's Exhibit 82. This was the usual form of transmittal letter, and we received the usual form of receipt from the bank with respect to the deposit of those drafts. On January 8, 1931, apart from the first $115,000 of acceptances which had then matured, there were other acceptances outstanding which had not been paid, and on said date we still owed the Wells Fargo Bank money on acceptances. The last acceptances were paid on February 26, 1930.

I remember that Mr. Hall made a statement to me that he had [225] some interest, he would not say a partnership interest, but he had some interest in the export business of Richfield Oil Company. I know that he made that statement to me once prior to the receivership, and that was during our discussion with Mr. Gilstrap. As I remember it,

(Testimony of Homer E. Pope.)

the substance of his statement was that he wanted the Foreign Department of Richfield kept as a separate and distinct transaction from the other business that Richfield might do with the Wells Fargo Bank. As I remember it, the subject of bankers lien did not arise at that time. To my knowledge no mention was made about the general indebtedness of Richfield to Wells Fargo Bank, and there was no discussion that there was a large so-called unsecured indebtedness. That indebtedness was no concern of mine as it was not in Mr. Hall's department.

I do not remember that Mr. Hall discussed with me that he was fearful that Richfield would not be able to pay that indebtedness. There was no such statement made in our conversation with the Wells Fargo Bank officials.

Before testifying in court, I examined various records of Richfield Oil Company and refreshed my memory from them, and a great deal to which I have testified is not my instant recollection in the matter but my recollection as refreshed after examination of the records and discussion with counsel.

Redirect Examination:

(The document containing the schedules next herein mentioned, was marked Plaintiff's Exhibit 117 for identification.)

During the past two or three days I made an examination of certain schedules and tabulations pre-

(Testimony of Homer E. Pope.)

pared by counsel and checked those tabulations with correspondence and other records of Richfield Oil Company in my possession. I also checked them up with respect to exhibit numbers when exhibit numbers were referred to in the schedules of Plaintiff's Exhibit No. 117 for identification. Other tabulations and schedules in said exhibit were examined and checked by me for the purpose of determining their accuracy. To the best of my judgment and [226] recollection those schedules and tabulations are correctly set up. Subdivision 1 of schedule (a) of said exhibit, under the title "Schedule of Drafts Claimed by Plaintiff to Have Been Deposited as Security for Acceptances Totalling $155,000.00", correctly sets forth the drafts claimed by plaintiff to have been deposited as security for acceptances totalling $155,000.00. These drafts were checked by me for the purpose of determining that they were accurately designated upon this schedule. Whenever we made a request for the issuance of acceptances, we had on deposit with the bank drafts to be used by the bank as security for the acceptances requested. There had been sent to the bank between the issuance of the $130,000.00 of acceptances, represented by $115,000.00, $5,000.00 and $10,000.00, and our request to issue the $25,000.00 additional acceptances, all of the drafts shown upon the first page of said exhibit commencing with draft No. 103023 for $779.10 to and including draft No. 113020 for $1200.00. Opposite

(Testimony of Homer E. Pope.)

draft No. 103012 there is an asterisk by which reference is made to the lower part of the page. That draft was for $2441.00; it was paid in installments; the first installment of $1500.00 was paid February 24, 1931, and applied on the acceptances; the second installment amounting to $470.00 was paid on April 4, 1931, and was credited to the account of the receiver; the final installment was paid on May 11, 1931, and was retained by the bank, as one of the amounts involved in this litigation. I testified upon direct examination that it was stated in the conversation had between Mr. Gilstrap, Mr. Hall and myself that the drafts which would be taken as security for the acceptances would have to have a maturity shorter than the maturity of the acceptances and the proceeds of the draft would have to be in San Francisco in advance of the maturity of the acceptances. When I requested the issuance of the last $25,000.00 worth of acceptances, there had been deposited [227] with the bank drafts having a face value of $159,600.50 as security for all of the acceptances including the proposed $25,000.00 worth of acceptances. Referring to said exhibit last mentioned, the first five drafts shown thereon in the following amounts, $63,950, $55,900.76, $2,442.40, $2,441.00 and $11,031.14, aggregated $135,765.30. Up to that point of time, there had been accepted and issued acceptances aggregating $130,000.00. Deducting this figure from the $135,765.30, we have a surplus of $5,765.30. After the

(Testimony of Homer E. Pope.)

issuance of those acceptances aggregating $130,000.00 and after we had as a reserve surplus the $5,765.30, there were deposited these other drafts referred to on page 1 of said exhibit, which, with the $5,765.30, aggregated $29,600.50, and I then requested the bank to issue the $25,000.00 worth of acceptances, which was done on November 28, 1930.

It is our claim that certain of the drafts deposited on or before the 28th of November, 1930, were not deposited under the acceptance agreement. The first of these were drafts No. 103005 for $63,950.00 and No. 103006b for $55,900.75. The next of these was draft No. 103024 for $1,007.00. With respect to this, the ship did not pick up the goods and the draft was not used. The next of these was draft No. 103025 for $583.00 deposited on October 28, 1930. This draft was paid on November 15, 1930, and was deposited after the acceptances aggregating $130,000.00 were executed and before we had requested additional acceptances totalling $25,000.00. This draft was paid before the date upon which we asked for the $25,000.00 worth of acceptances. The next of these drafts was No. 103028 for $1,204.78 deposited on October 28, 1930, and this was the other draft which was not used because the goods were returned, the ship not taking the goods. It is our claim that draft No. 103027 for $381.60 and draft No. 113008 for $1,007.00 and draft No. 113009 [228] for $5,256.60 and draft No.

(Testimony of Homer E. Pope.)

113018 for $641.25 were not sent up to the bank to be used under the acceptance agreement. It was my custom to figure out as closely as possible the date upon which the proceeds of drafts would be payable in San Francisco. I made that estimate with respect to the four drafts last mentioned. I estimated that the proceeds of those drafts would be received in San Francisco after February 26, 1931. Drafts No. 113021 for $2,237.66 and No. 113023 for $881.13 were deposited after we requested the issuance of the acceptances totalling $25,000.00, and therefore our claim is that they were not under the acceptances. It is our claim that none of the drafts deposited after November 28, 1930, were deposited under the acceptances. Up to the time that the $25,000.00 worth of acceptances were requested, I understood that we had on deposit with the bank under the acceptance agreement a sufficient amount of drafts at a proper maturity to support the acceptances.

Draft No. 103026 for $2,446.82 was deposited as security for acceptances. This draft was paid December 27, 1930, and the proceeds were credited to the Richfield Oil Company. There were sufficient drafts left to take care of the acceptances outstanding. These proceeds were credited by the bank to the Richfield Oil Company without a request of Richfield Oil Company. Draft No. 103029 in the sum of $654.55, deposited on October 28, 1930, was paid on the 27th of December, 1930. This

(Testimony of Homer E. Pope.)

was one of the drafts deposited under the acceptances. The proceeds were collected and applied by the bank without request to the commercial account of Richfield Oil Company, leaving plenty of drafts to meet acceptances. Draft No. 113011 for $103.12 was deposited on November 19, 1930, and paid December 12, 1930. The bank credited the amount of the draft to the account of the Richfield Oil Company without request. Draft No. 113019 for $291.50 was deposited on November 24, 1930, and paid [229] December 12, 1930. The proceeds were credited to the account of Richfield Oil Company without request. This draft was deposited under the acceptance agreement, and draft No. 113020 for $1,200.00 was deposited November 24, 1930, and paid December 18, 1930, and the bank without any request from the Richfield Oil Company deposited the net proceeds to the credit of the Richfield Oil Company. The total of the six drafts last referred to is $5,278.99, and their net proceeds was $5,255.86, and this entire sum was credited to the account of the Richfield Oil Company. Prior to the date of the appointment of the receiver, the bank had not sent any communication to the Richfield Oil Company in writing indicating that it intended to or was offsetting any moneys which it had collected upon these drafts as against any indebtedness claimed by it to be due to it from the Richfield Oil Company. Draft No. 13106 for $11,107.50 was deposited on January 8, 1931, and paid March 5, 1931.

(Testimony of Homer E. Pope.)

The bank voluntarily and of its own initiative put that entire sum to the credit of the receiver by applying it to his account, and did not notify the receiver or the Richfield Oil Company that it claimed any offset or lien against that money. Draft No. 13108 was deposited on January 15, 1931, and paid on March 23, 1931. The proceeds of this draft were deposited to the account of the receiver. Draft No. 103012 for $2,441 was deposited on October 11, 1930, and an installment of the proceeds of it in the sum of $468.05 was received on April 7, 1931. This was one of the drafts deposited under the acceptance agreement. On February 20, 1931, the sum of $1500 was paid on account and the net proceeds of said payment, to-wit, $1,488.87, were applied towards the payment of acceptances aggregating $25,000. On April 7, 1931, the sum of $468.05 was paid. The sum of $468.05 was credited to the account of the receiver voluntarily and the bank did not notify the company that any right of offset or bankers lien was claimed against this sum. Later and on May 11, 1931, the balance of the draft amount- [230] ing to $471 was paid and that sum is one of the sums being retained by the bank under the alleged right of setoff. Draft No. 103027 in the sum of $381.60 was deposited on October 27, 1930, and paid on March 3, 1930. The bank credited the proceeds to the receivership account voluntarily. Draft No. 113008 for $1,007 was deposited November 18, 1930, and paid March

(Testimony of Homer E. Pope.)

19, 1931, and the proceeds thereof credited to the receiver's account voluntarily. Draft No. 113021 for $2,237.66 was deposited November 24, 1930, and paid March 23, 1931, and the net proceeds thereof were credited to the receiver's account voluntarily. The proceeds of drafts No. 123009 for $3,418.90, deposited December 23, 1930, and paid March 24, 1931; No. 123010 for $1,266.29, deposited December 13, 1930, and collected April 4, 1931; No. 123013 for $2,702.66, deposited December 27, 1930, and paid on March 30, 1931; No. 123015 in the sum of $2,692.99, deposited December 27, 1930, and paid April 22, 1931, were credited to the account of the receiver voluntarily by the bank. I never heard of any communication being sent by the bank to the Richfield Oil Company or to the receiver to the effect that the bank was setting off or had a right to set off these sums against any indebtedness due from the Richfield Oil Company.

Schedule I entitled "Schedule showing total proceeds of drafts paid to Richfield Oil Company and/or to Receiver without claim of offset", is a recapitulation of some of the earlier schedules showing first the total proceeds of drafts paid to Richfield Oil Company as per Schedule G amounting to $5,255.86; surplus proceeds of four drafts paid to Receiver after payment in full of acceptances as per Schedule F, $7,749.58; then the total proceeds of remaining drafts paid to Receiver after payment in full of acceptances as per Schedule H,

(Testimony of Homer E. Pope.)

$26,469.57. This total sum, with the exception of the $7,749.58 which is taken care of by correspondence to which I have already referred, was voluntarily paid by the bank either to the Richfield Oil [231] Company or to the Receiver without any protest, and without any claim of right of setoff or bankers' lien.

The aggregate net proceeds of the drafts to which the bank had recourse to take care of the acceptances was $162,749.58. From this sum the acceptances aggregating $155,000.00 were paid, leaving a net balance of $7,749.58 in the hands of the bank, which is the sum referred to in Plaintiff's Exhibit 107.

Drafts No. 103005 and No. 103006b, the two 180 day sight drafts of Birla Bros., deposited October 8, 1930, proceeds of which were received in San Francisco on June 16, 1931; No. 123014 for $1,245.11, deposited December 27, 1930, and paid May 18, 1931; No. 103012, $468.06 of which was paid in May, 1931, and $1,500.00 of which was applied on account of the $25,000 of acceptances, and No. 13107, a 180 day Birla Bros. draft for $23,532.08, deposited on January 8, 1931, the proceeds being paid on September 10, 1931, are the drafts in litigation here, and the bank is retaining the proceeds thereof.

The next schedule entitled "Schedule of drafts not discounted—deposited before receivership, pro-

(Testimony of Homer E. Pope.)

ceeds of which were paid and credited to the Receiver's account", refers to five drafts deposited by Richfield Oil Company before receivership aggregating $152,524.03. This sum was collected by the Security-First National Bank after the appointment of the Receiver and after the receipt of the telegram of January 16, 1931, by the bank and after all of the other banks had sent in their telegrams, which proceeds were paid over to the Receiver by the Security-First National Bank. These drafts had been deposited by the Richfield Oil Company with that bank for collection only.

(The foregoing testimony commencing with the words, "The next schedule" were objected to by counsel for defendant as incompetent, irrelevant and immaterial, and not binding upon, or evidence against defendant. Objection overruled and exception noted.) [232]

Mr. Lyons, who wrote the letter of October 7, 1930, introduced in evidence as Defendant's Exhibit "A", was not with me and Mr. Hall in San Francisco at the time of the conversation at the Wells Fargo Bank & Union Trust Co. He had nothing to do to my knowledge with any of the arrangements made between the bank and the Richfield Oil Company. That letter was written by him and then sent over to my department and accompanied the letter of transmittal.

(Testimony of Homer E. Pope.)

Recross Examination:

This letter, Defendant's Exhibit "A", was written by Mr. Lyons. The initials upon the letter are Mr. Hall's initials and the change from 120 days to 90 days are Mr. Hall's, likewise. Mr. Hall was with me in San Francisco and had been to the bank prior to my having been there with him. With respect to the drafts claimed by us to have been deposited as security for acceptances, I don't remember having written to the Wells Fargo Bank that we were sending them up as security for acceptances. There is no letter with respect thereto. With the exception of the first few drafts, as shown by our correspondence, we did not tell the bank what drafts we were sending up as security for the acceptances.

Further Redirect Examination:

Aside from the sum of $7,749.58, which was the net balance in the possession of the bank from the proceeds of the four drafts after the satisfaction and discharge of the balance of the acceptances, I do not know of any communication sent by the bank to the receiver or to the Richfield Oil Company prior to the early part of May, 1931, notifying the receiver or the company that the bank intended to exercise the right of setoff or banker's lien. [233]

ROBERT L. HALL

was then called as a witness for plaintiff, and testified as follows:

I live at 1549 North Idlewood Road, Glendale, California, in Los Angeles County, and have been a resident of Los Angeles County for 21 years. At the present time I am employed by the United States Government doing special work for a certain department. I went into the employ of the Richfield Oil Company on February 1, 1927. Prior to that time my business had been the exportation of petroleum products. I was employed by the Richfield Oil Company to organize and build up a foreign or exporting department for them, turn over to them my contracts and business which I had before, and to make the department as large as possible in the shortest length of time. Prior to my association with the Richfield Oil Company it had no foreign department. I was employed by the Richfield Oil Company on a fixed drawing account with a certain commission on all goods sold by me to be accepted by the Richfield Oil Company. After my association with the Richfield Oil Company I built up an export and foreign trade business for them in various foreign ports. I organized an exporting and foreign department and was the head of that particular department. I was known as Manager of the Foreign Department. The employees in that department were directly under me, and I was in turn under some of the officials of the Richfield Oil Company. I did all the selling

(Testimony of Robert L. Hall.)

and all the contact with the foreign customers. I passed preliminarily upon all credits, which were confirmed by the credit department; I looked over and passed on all the details of the business as to shipment and seeing that the goods were properly packed and properly dispatched in the harbor; in other words, I had complete charge of it, not being able to obligate the company in any way except with their approval, except [234] in the general O.K.-ing of the details. I negotiated all of the sales of goods and the terms of the sales, but those had to be approved by the officials of the company. In connection with the foreign sales and foreign shipmnts, the documents were prepared in my department by a clerk. Prior to the latter part of 1930, I had become familiar with the firm of Birla Bros. Ltd., located at Calcutta, India. I had transacted business with that firm for some considerable period of time prior to the month of October, 1930. To the best of my knowledge, Birla Bros. had been a customer of the Richfield Oil Company for approximately a year and three-quarters of two years prior to the month of October, 1930. We had an agreement with them respecting the terms of payment. The terms of payment were fifty per cent of the amount of the invoice at sight and fifty per cent of the amount at 180 days D/A.

(The foregoing testimony commencing with the words, "We had an agreement" was ob-

(Testimony of Robert L. Hall.)

jected to by counsel for defendant on the ground it was incompetent, irrelevant and immaterial. Objection was overruled and exception noted.)

Prior to the early part of October, 1930, the Foreign Department of Richfield Oil Company had been doing business with the Security First National Bank, the Citizens National Bank, and the Bank of America, all of Los Angeles. The majority of the drafts deposited with the Security First National Bank prior to October, 1930, were discounted, and some were sent through for collection.

My deposition was taken as a witness in this case approximately the first of October, 1931. I was on a trip when the deposition was taken and came off a boat that was in San Francisco, and upon which I had come to San Francisco. I had had no opportunity to make any investigation of correspondence or records pertaining to this controversy prior to the giving of my deposition. I had had no opportunity to refresh my recollection in connection with [235] any of the facts or to confer with counsel. In order to testify in this case I have recently examined my correspondence and to some extent the records pertaining to the matters involved in this case.

I know Mr. Gilstrap, the Assistant Manager of the Foreign Department of the Wells Fargo Bank. I had known him for some years prior to the month

(Testimony of Robert L. Hall.)

of October, 1930. During or about the month of August, 1930, some dispute arose with respect to the handling of our collections with the Security Bank at Los Angeles, and I concluded that if arrangements could be made, I would like to have the Wells Fargo Bank take care of our collections. On August 17, 1930, I came to San Francisco and went immediately to the Wells Fargo Bank to Mr. Gilstrap's office and I discussed with him the general situation of the Richfield Oil Company's collections, and stated that I was contemplating turning over all the Richfield's collections in foreign countries as far as possible to them. I stated to him and explained to him that I would be responsible as far as possible for those collections and would watch them. I stated to him at that time my employment at the Richfield Oil Company, and I asked him to remember that any transactions were to be considered separate from other transactions of the Richfield, that is, the entire transactions, monetary, the collections of drafts for us or any other business connected with the Foreign Department of Richfield Oil Company.

At that time I knew only in a general way that Richfield Oil Company was obligated for any indebtedness due from it to Wells Fargo Bank. I did not know at that time that a large part of the indebtedness due from Richfield Oil Company to various banks, including the Wells Fargo Bank, was unsecured. I knew that Richfield Oil Com-

(Testimony of Robert L. Hall.)

pany owed many banks and I knew that there was a friendly relation between the Wells Fargo Bank and certain officials of Richfield. I knew prior to this visit that Richfield Oil Company [236] was being pressed for ready cash. Before visiting the Wells Fargo Bank I knew about the right of setoff a bank might have upon paper deposited with it and on the proceeds of paper deposited with it. I knew something about bankers liens.

I stated to Mr. Gilstrap that I had an interest in all collections which were emanating in the Foreign Department and I wanted him to consider it was a separate business arrangement from any other business Richfield had with the Wells Fargo Bank. Mr. Gilstrap said that he understood my position. That is all he said.

I had with me a rough copy of a certain number of our foreign correspondents which were our customers. We discussed those. I stated that I would prepare and send him a complete list of our customers. We discussed Birla Bros. in India in a general way only. I told him that we were shipping to Birla Bros. at fifty per cent at sight and fifty per cent at 180 days D/A. Then I brought up the subject of the use of acceptances. Mr. Hellman came out and we discussed the advantage of the use of acceptances, there being a saving thereby of two and one-quarter or two and a half per cent. Mr. Hellman entered into the conversation in a slight degree, the result being that I believe Mr. Hellman

(Testimony of Robert L. Hall.)

took me downstairs and introduced me to Mr. Lipman, the President of the Bank. Before going in I was introduced to Mr. Eisenbach. I discussed with Mr. Gilstrap the length of time of the drafts under the acceptances. It was stated that 90 day acceptances were more quickly sold. Possibly 120 day acceptances and very rarely, if any, those at 180 days maturity might be taken.

Prior to meeting Mr. Hellman, the only conversation I had with Mr. Gilstrap with respect to acceptances and the procedure to be pursued with respect thereto was that I told him that I had [237] convinced the Richfield Oil Company that the use of acceptances was the proper way of handling export shipments. I conferred with Mr. Hellman at Mr. Gilstrap's desk and in the presence of Mr. Gilstrap. I stated to them that in place of discounting individual drafts I had convinced Richfield that the use of acceptances was the better mode of procedure. Mr. Gilstrap had told me that there was a saving in the use of acceptances of approximately two and a quarter to two and a half per cent. Before I met Mr. Hellman, nothing had been said respecting the character of paper that would be accepted under the acceptances, nor was anything said in that regard during my first conference with Mr. Hellman in the presence of Mr. Gilstrap.

After having a brief conversation with Mr. Hellman, he took me down to the first floor and intro-

(Testimony of Robert L. Hall.)

duced me to Mr. Lipman, in Mr. Lipman's private office. To the best of my recollection, Mr. Hellman stepped out. I was with Mr. Lipman about five minutes. Mr. Lipman told me that he had heard good reports from his Foreign Department in regard to collections of the Foreign Department of Richfield. Mr. Lipman stated that he had accommodated Richfield to a large extent and also had accommodated Mr. Talbot, and he would give a further line of credit based on foreign drafts in the amount of $150,000.00 or thereabouts and see how it would work out. I then made it particularly strong to Mr. Lipman as to my position as Manager of the Foreign Department, that I would continue to give my very careful attention to the drafts of the Foreign Department for two reasons, that I had a personal interest in the collections of the department and that I wanted it considered to be a separate transaction from any obligations or any transactions other than those of the Foreign Department—Richfield's [238] obligations, I mean. In response to this, Mr. Lipman made a remark that "that is good" or "that is excellent". That was the extent of the conversation I had with him and is the only conversation I ever had with Mr. Lipman on this matter.

I left Mr. Lipman's office and went upstairs to the fifth floor to Mr. Gilstrap's desk where I met Mr. Gilstrap again. I was alone with Mr. Gilstrap. I reported to him what Mr. Lipman had told me.

(Testimony of Robert L. Hall.)

I was in San Francisco for six days on that occasion. During that time I had other meetings with Mr. Gilstrap.

During those meetings I discussed the Birla Bros. account in India, stating that Birla Bros. were shipping on a fifty per cent sight and fifty per cent 180 D/A, which is Documents Against Acceptances. I discussed the situation of Birla Bros., its prominence and its financial standing. I believe I discussed whether the entire drafts on Birla would be available for acceptance purposes. He stated, as I remember it, that undoubtedly the sight drafts would be available, but he doubted that the 180 day drafts would be, on account of the length of time it took the drafts to get over to India, which was about 30 days, and then about 30 days or so for the proceeds to return to the bank. The 30 days going over and the 30 days coming back would be added to the 180 day draft.

If the 180 day sight draft is to be accepted in India, the 180 days do not commence to run until the customer sees the draft.

I returned to Los Angeles and to the best of my recollection I took a sample copy of the form of acceptances back with me. Upon my return to Los Angeles, I sent a letter to Wells Fargo Bank & Union Trust Co. [239]

Plaintiff then introduced in evidence a letter from Richfield Oil Company, signed by R. L. Hall, Manager of the Foreign Department, to Wells Fargo

(Testimony of Robert L. Hall.)

Bank & Union Trust Co. dated August 27, 1930, and the same was received in evidence and marked Plaintiff's Exhibit 118. Said letter stated that a list of customers of Richfield in Central and South America was enclosed, and that this was being done following out the statement of the bank to help Richfield in any way it could by obtaining up to the minute credit reports from the local banks at each city regarding the financial standing and opinion of the community as to the integrity of the customers. There was attached to this letter a list of the foreign customers of Richfield Oil Company in Central and South America.

Said witness testified further as follows:

I next left Los Angeles for San Francisco on October 4th. I left Los Angeles on that occasion in company with Mr. Pope. Prior to my departure from Los Angeles I had seen the blank acceptance agreement as well as the forms of acceptances totalling $150,000 which were brought by Mr. Pope to San Francisco on that occasion. We reached San Francisco on Sunday morning, October 5th, and I visited the bank with Mr. Pope on Monday morning. We saw Mr. Gilstrap and were in conference with him about an hour. We had a general discussion in regard to the use of the acceptances, as to the maturity of the drafts on customers. In the conversation it was stated that 90 day acceptances were the best to be used on account of the ready sale of the same. We discussed that all foreign

(Testimony of Robert L. Hall.)

drafts must be arranged so that the proceeds of the same would be in Wells Fargo's hands prior to the maturity of the acceptances. Mr. Gilstrap stated that under no consideration would the 180 day paper be used. We then discussed the shipment which was going forward to Birla Bros. and the 180 day drafts which were on that account. Mr. Gilstrap stated that those [240] drafts would not be acceptable for two reasons—the length of time, and also that he had received a credit report which they did not believe was sufficiently good to allow them to take it. I then reiterated my former conversation with Mr. Gilstrap, that if the acceptances were used that it must be definitely understood that it was a separate transaction from any other transaction in a monetary way which Richfield had with the Wells Fargo Bank. I was following orders in that respect from Mr. McKee. Before coming to San Francisco I had had a conversation with Mr. McKee, who was a Vice President of Richfield and Assistant to the Chairman of the Board, regarding the subject matter of my visit to San Francisco.

Mr. Pope delivered the signed acceptance agreement and the $150,000 of signed acceptance forms to Mr. Gilstrap.

I don't think there was anything said by Mr. Gilstrap or by myself and Mr. Pope during that conversation as to how the 180 day paper would be handled.

(Testimony of Robert L. Hall.)

Mr. Pope and I left San Francisco that evening and returned to Los Angeles. I returned alone to San Francisco the next night. I brought with me the complete drafts and papers on the Birla Bros. shipment. I brought also with me a letter signed by Mr. Lyons which has been introduced in evidence as Defendant's Exhibit "A". I also brought with me the two letters of transmittal dated October 7, 1930, relating to the two shipments, together with the shipping documents and also the bills of lading. When I reached San Francisco, I went to Wells Fargo Bank and met Mr. Gilstrap. Before coming to San Francisco, I had examined the two letters of transmittal— the Lyons letter and the documents accompanying the letters of transmittal—so I was familiar with them all. I brought them over to the bank and had a conference with Mr. Gilstrap on that occasion. He was the only official of the bank with whom I had [241] any conference on that date.

I presented the drafts and the entire folder with the papers and stated that I wanted to get as much money as I could, as much in acceptances cashed as I could. Mr. Gilstrap stated he could only accept Richfield acceptances covering sight drafts on Birla. He then took the papers and released $115,000, which as I remember covered the sight drafts which were $119,000 odd. He gave me a duplicate deposit slip. I immediately left the bank and went down to the Postal Telegraph Company

(Testimony of Robert L. Hall.)

and telephoted that deposit slip to Los Angeles because I was instructed to get that money to Los Angeles as near to ten o'clock as I could. I asked Mr. Gilstrap if it were possible to include any of the 180 day drafts under the acceptances, and he said absolutely not. To the best of my knowledge the only remark that was made as to what would be done with the 180 day drafts was that Mr. Gilstrap said when I turned over the entire papers that he would send them all together to the correspondent in Calcutta. I don't remember anything having been said in the prior conversations occurring between myself and Mr. Gilstrap respecting the collection of the 180 day drafts.

While Mr. Pope and I were together with Mr. Gilstrap, he said that all drafts that were used for acceptances must be paid and the proceeds be in the Wells Fargo Bank at least one day before the acceptances matured.

After having returned to Los Angeles I had a number of conversations by telephone with Mr. Gilstrap. Mr. Gilstrap paid a visit to Los Angeles shortly after October 8, 1930, at my invitation.

Plaintiff then introduced in evidence a telegram from Mr. R. L. Hall of the Richfield Oil Company to Wells Fargo Bank & Union Trust Co., dated October 16, 1930, and a telegram from Mr. Leuenberger of Wells Fargo Bank & Union Trust Co. to R. L. Hall of Richfield Oil Company, dated October 16, 1930, and the same were received in

(Testimony of Robert L. Hall.)

evidence and marked Plaintiff's Exhibit 119. The telegram from R. L. [242] Hall to Wells Fargo Bank & Union Trust Co. requested that Mr. Gilstrap visit the Richfield Oil Company at Los Angeles, in order to establish closer relation between the bank and the Richfield Oil Company, and to observe more closely the operations of the Richfield Foreign Department. The telegram from Mr. Leuenberger to Mr. Hall stated that Mr. Gilstrap would be sent to Los Angeles.

Said witness testified further as follows: I saw Mr. Gilstrap at Los Angeles on the Saturday morning following my wire of October 16th. On that occasion I discussed with Mr. Gilstrap the Birla shipment. I went over again with him the very large cash expenditure which Richfield had to make. I told him I was very sorry that he could not use the 180 day Birla drafts, but that I hoped that after 90 days had passed we could issue acceptances for the unexpired term. Mr. Gilstrap stated that presumably that would be all right, but that a new acceptance agreement would have to be executed for the additional amount.

Approximately May 8, 1931, I telephoned to Mr. Gilstrap at the request of Mr. Muller who was Assistant General Sales Manager of Richfield. I asked Mr. Gilstrap the cost to cable the proceeds of the 180 day drafts when Birla had paid those to his correspondent. He stated that the cost was approximately $500. I reported this conversation

(Testimony of Robert L. Hall.)

to Mr. Muller and a very few minutes afterwards Mr. Gilstrap called me on the telephone. He stated that Wells Fargo Bank was going to grab that money. I asked him why and he stated that they were going to take it, exercising a lien on it for other indebtedness owed the bank. I stated that I was very surprised since they had agreed not to touch any of the collections of the Foreign Department of the Richfield Oil Company. He said he was sorry but that was the decision of the bank. The next day I went to San Francisco and conferred with Mr. Gilstrap, Mr. Eisenbach and Mr. Motherwell. I was with these gentlemen for practically all of two days. I told Mr. Gilstrap, Mr. Eisenbach and Mr. Motherwell about my situation with the Richfield [243] Oil Company, that it was on a commission basis, and that I had an interest in all the collections. I refreshed their memory that I had brought that up with them before and I elaborated on this to a great extent. I stated to Mr. Eisenbach that I understood there was an agreement with Mr. McDuffie that any of the collections would not be taken. I believe—I am positive that Mr. Eisenbach agreed with that statement, but said Mr. Lipman had decided to change his mind and effect the lien against these collections that were coming in. At a meeting with Mr. Gilstrap. Mr. Eisenbach and Mr. Motherwell, I reiterated all the statements that I had made to Mr. Gilstrap and Mr. Eisenbach with reference to the

(Testimony of Robert L. Hall.)

way I understood the agreement. They did not deny any of the statements which I made to them respecting the negotiations occurring at the time of the inception of this business, or respecting the agreement with the receiver. They stated Mr. Lipman was in the East and that he was the man who would have to be conferred with for if the bankers' lien was released it would have to be done on his order. I remained in San Francisco for about two days and the money was not released. I then returned to Los Angeles, and that ended my connection with this situation.

I have been ill for some time and was very seriously ill two years ago. I am pretty near well now.

Cross Examination:

That illness affected my nerves, but my nervousness has been gradually disappearing. It was worse in 1930 than in 1931. I don't think that illness affected my memory. I believe my memory might be affected as to details but would be refreshed in checking up evidence. I do not think my memory would be uncertain as to the order of the conversations and as to the exact contents of them to which I have testified. I am quite certain as to the order of each event and as to the sequence of my visits to the Wells Fargo Bank because I have been careful to check up these visits. I have checked up from the records of the Traffic Department of the Richfield Oil Company. I did not refresh my

(Testimony of Robert L. Hall.)

[244] memory prior to the time of my deposition, which was taken in September, 1931. Since the giving of my deposition I have examined the records of the Richfield Oil Company, including the records of the Foreign Department and the records of the Traffic Department. The correspondence which I used in refreshing my memory has been introduced in evidence. The correspondence is approximately all the records I used. Prior to testifying, I discussed this matter in great detail with Mr. Ward Sullivan, counsel for the receiver, and with Mr. Roche.

The occasion of my first visit to the Wells Fargo Bank with reference to these matters was to turn over the entire collections as far as possible to the Wells Fargo Bank, the Richfield Oil Company being dissatisfied at that time with the method in which foreign collections were handled by the Security First National Bank of Los Angeles. The date of that visit to the best of my recollection was August 18, 1930. Mr. Pope was not with me on that visit.

I gave a deposition on behalf of Plaintiff in this action on or about the 30th day of September, 1931. In that deposition I testified that the occasion of my first contact with Wells Fargo Bank & Union Trust Co. was during the month of September, 1930, the occasion of my contact being that my department was having considerable difficulty on service of collection of foreign bills, and that for many years I had known the service of the Wells

(Testimony of Robert L. Hall.)

Fargo Bank, considered in the export trade one of the best foreign operators on the Coast.

In that deposition I further testified that at the first meeting in connection with this business, Mr. Gilstrap, Mr. Leuenberger and Mr. Hellman were present at the conversation, and that Homer E. Pope was with me from the Richfield Oil Company.

In examining the records of the Foreign Department of Richfield Oil Company I determined that Mr. Pope did not come to San Francisco with me on the occasion of my first visit, and an examination of the records of the Foreign Department caused me to state [245] now that my visit to Wells Fargo Bank was on or about the 17th day of August, 1930. I have nothing that refreshes my memory that Mr. Leuenberger was not present at that conversation. My recollection at the present time is that Mr. Gilstrap was present, and for a short time, Mr. Hellman.

I don't think I stated to Mr. Gilstrap what my connection with the Richfield Oil Company was. I think he knew that.

At the taking of my deposition on September 30, 1931, I testified that I told Mr. Gilstrap that if any form of acceptances were used it would be absolutely understood that it was an entirely distinct transaction from other obligations of the Richfield Oil Company; that I was a partner of Richfield Oil Company in this foreign business; that I had a personal interest in the money, and

(Testimony of Robert L. Hall.)

that I would make it an absolute understanding that I would watch those acceptances and keep the amount of the bills in excess of those acceptances.

At this conversation I believe I brought up the question of acceptances, and told Mr. Gilstrap I thought it was the best way of handling the Richfield Oil Company's business. To the best of my knowledge, Mr. Gilstrap told me what the saving would be by the use of acceptances.

When I stated in my deposition that I had a partnership interest, I did not mean that I was actually a partner in the Richfield Oil Company. I stated at that meeting that I had a commission interest. This commission depended upon the collection of the proceeds of sales by Richfield. The collection of my commission has been a question of dispute between me and the receiver of the Richfield Oil Company for some time and is the subject of a law suit involving $442,000. Proceeds of the drafts which are involved in this litigation are not involved in that suit. I would have an interest to a [246] certain extent after they were paid to Richfield. My claim to part of the proceeds involved in this litigation has been disallowed. An appeal is being arranged by my attorney at the present time. I certainly claim an interest in the proceeds of these drafts and I claimed that interest ever since and long before I learned that Wells Fargo Bank was not going to return the proceeds to the receiver. I first told Wells Fargo Bank of my interest in the

(Testimony of Robert L. Hall.)

proceeds of these drafts at the meeting with Mr. Gilstrap, Mr. Eisenbach and Mr. Motherwell after I learned that Wells Fargo Bank was claiming the proceeds under an agreement or right of set-off. At the occasion of my first conversation with Mr. Gilstrap I did not tell him the amount of my interest. I told him I was operating on a commission basis.

In my conversation with Mr. Gilstrap I described the way we were shipping to Birla Bros., fifty per cent of the face of the invoice at sight and fifty per cent 180 days after sight D/A, or documents against acceptance.

Upon the payment of the first draft and acceptance of the draft for the balance, the documents entitling the consignee to the shipment would be released to the buyer or the consignee.

I first saw Mr. Lipman on the first day after I arrived in San Francisco in August. Before I saw Mr. Lipman, Mr. Hellman had come into the conversation. In Mr. Hellman's presence, Mr. Gilstrap and I discussed the amount of the acceptances. I didn't ask for any specific amount. I don't think Mr. Hellman stated the amount he thought would be recommended. I don't think anything was said in the presence of Mr. Hellman about our 180 day paper on Birla Bros.

Mr. Hellman suggested that I go downstairs to see Mr. Lipman. He said he would like to have me know Mr. Lipman and tell [247] him what I was

(Testimony of Robert L. Hall.)

planning to do and as I remember it how much he would loan us. He said the method of making the loan would rest with Mr. Lipman. I said nothing in the presence of Mr. Hellman with respect to the so-called separateness of this transaction as distinguished from other transactions of the Richfield Oil Company. Mr. Hellman took me downstairs to see Mr. Lipman on the occasion of my first visit to the bank with reference to this matter.

I testified in my deposition that I had two further conversations about the first of October with officials of the Wells Fargo Bank, and that Mr. Gilstrap and Mr. Leuenberger were present at the first of these and that nobody was with me from the Richfield Oil Company, and that after a few minutes I went downstairs and was introduced to Mr. Lipman; that Mr. Lipman stated to me that Richfield Oil was obligated to the bank in a considerable sum, but he was willing to grant acceptances from Richfield from $150,000 to $200,000 or $200,000; and that I told Mr. Lipman that I had told Mr. Gilstrap that if they granted us acceptances, it was an entirely distinct matter from any financial obligations, and I reiterated in my conversation that I had an interest and that the Foreign Department was mine on a joint account. I didn't have a chance to correct this deposition. I looked it over for about five minutes and then had to rush and catch my steamer. Having caught the steamer in San Pedro and coming up here on it

(Testimony of Robert L. Hall.)

and staying aboard and coming over and giving my deposition and rushing back—I just made the steamer as the gangplank was pulled aboard.

It is a fact that I did not see Mr. Lipman on the occasion of my visit in October, but on the occasion of my first visit in August. I was wrong in that particular.

When I was taken to Mr. Lipman's office, Mr. Hellman went downstairs with me. I believe Mr. Gilstrap went with us to the first floor. Mr. Gilstrap parted from us, and Mr. Hellman took me up and I waited until Mr. Lipman got through with a conversation he was having. I am not sure Mr. Eisenbach was there when I went down there. Mr. [248] Hellman introduced me to Mr. Lipman. Mr. Hellman was not present with us during the interview. To the best of my recollection he left after introducing me. My conversation with Mr. Lipman lasted from five to ten minutes. We stood up throughout the entire conference, and Mr. Lipman was standing by his desk close to the door. Mr. Lipman said he would give us $150,000 or $200,000; he may have said $250,000. He made no statement as to how he knew what credit we were entitled to. I did not ask him about any specific credit. I do not remember that Mr. Hellman asked him for the amount he would advance to Richfield. Mr. Lipman said he knew about our drafts and collections and had heard good reports from his Foreign Department about our colleticons. He stated that he had

(Testimony of Robert L. Hall.)

loaned Richfield large sums of money and also had accommodated Mr. Talbot, and that under acceptance obligations he would grant a further credit of $150,000 or $200,000, and see how it would work out. He did not say that this was to be a separate line of credit.

I don't think Mr. Lipman stated that he would advance $150,000 or $200,000 upon the security of our foreign collections—I think he used the word "drafts". To the best of my recollection Mr. Lipman's statement was that he would advance upon the security of our foreign drafts $150,000 to $200,000.

It was when Mr. Lipman completed his remarks that I stated that this must be kept separate and apart. It was immediately prior to my leaving his office. As I remember it, I stated to Mr. Lipman that it was to be understood that this further credit was to be kept separate and be a distinct arrangement with the Foreign Department.

After I left Mr. Lipman, I saw Mr. Gilstrap again. I told him that I would have to take the whole matter of acceptance forms up with the officials at Los Angeles and that he would be advised, and that I could not, myself, pass upon the financial ar- [249] rangements. I believe I discussed with him on that occasion what drafts would be deposited by Richfield under the acceptance arrangement. The substance of that conversation was that following out the use of short term ac-

(Testimony of Robert L. Hall.)

ceptances, that is, ninety days, all drafts would have to come so that they would mature prior to the maturing of the acceptances and be equal to or a little in excess of the acceptances. This was further discussed when Mr. Pope was with me at a subsequent visit. At the first visit I don't think it was mentioned that we could have as high as 180 day paper or paper of any length as security for acceptances because the maturity of the acceptances was the important thing, and when 90 days were up on the first acceptances the bank would renew the acceptances, but this may have been brought up later. As I remember the conversation, whether it was the first or the second trip or whether it was brought up by Mr. Gilstrap or Mr. Hellman or Mr. Leuenberger, it was stated that it was possible that new sets of drafts could be deposited with the bank and the acceptances might be renewed. Also, in cases where the drafts under the acceptances would not be paid, other drafts which we had which were not available for acceptances could replace those drafts.

It was not said at these conferences that we would only need one acceptance agreement to cover various transactions. The only time that a continuous credit was mentioned was I believe by Mr. Gilstrap at first. He said that it could be handled on an acceptance or form a revolving or continuous credit. My talk with Mr. Lipman was absolutely distinct, that we would open a direct line of credit

(Testimony of Robert L. Hall.)

of $150,000 or $250,000, and he stated he would see how that would work out.

After returning to Los Angeles I called Mr. Gilstrap on the phone and asked him to forward trade acceptances and blanks forms of acceptances.

Defendant then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to R. L. Hall, care of Richfield Oil Company of California, and said letter was received in evidence and marked De- [250] fendant's Exhibit "D". Said letter was dated October 1, 1930, and was in the words and figures following:

> "In accordance with your request made by telephone today, we enclose forms of acceptances and acceptance agreements.
>
> We have completed one specimen acceptance and one specimen acceptance agreement for your guidance.
>
> We understand that Our Mr. Eisenbach has discussed the use of these acceptances with your treasurer, Mr. R. W. McKee.
>
> If you require any further information, please do not hesitate to call upon us.
>
> Yours very truly,"

Said witness testified further as follows:

Plaintiff's Exhibit 16, entitled "Acceptance Agreement", in blank was enclosed with the letter marked Defendant's Exhibit "D". I saw Plaintiff's Exhibit 16 when it came to me and after it was executed and also when Mr. Pope delivered

(Testimony of Robert L. Hall.)

it in San Francisco. I have no recollection as to whether $150,000 worth of acceptances were delivered to Mr. Gilstrap, but I presume they were because Mr. Pope got a receipt for them. In my deposition I testified that I came back with the acceptance forms signed in the amount of $115,000 and that they were divided up into eight drafts.

I was confused in my deposition.

Mr. Gilstrap said the credit report showed that Birla Bros. was not financially strong enough and that the credit report was not good enough. He stated that on account of the length of time of the drafts and also on account of the report which he had received, they could not touch the 180 day drafts. He stated they would advance only to the amount of the sight drafts.

Mr. Leuenberger came into the conference and I asked him whether he could handle the 180 day drafts and he said he could not. He made some remark about the credit report, saying it did not look good.

To my knowledge, nothing was said by any of the parties on October 6th with respect to the blanks in the agreement. I am under the impression that something was stated by Mr. Gilstrap that the [251] drafts going under the acceptance forms would be distinctly set aside and placed in a line or marked as being under the acceptance agreement.

I never transmitted any list of drafts supposedly

(Testimony of Robert L. Hall.)

under the acceptance agreement to the Wells Fargo Bank. I do not know that Mr. Pope ever transmitted such a list.

Upon returning to Los Angeles on the night of October 6th, I reported to Mr. McKee, the vice president of Richfield, and Mr. Lyons, the Comptroller, the result of my visit to San Francisco, and that this credit was in effect at San Francisco and ready for operation. I then returned to San Francisco and was entrusted with three letters and drafts and documents covering a shipment of goods to Birla Bros. at Calcutta, India. I brought the letter, Defendant's Exhibit "A". The change in the maturity date of acceptances from 120 days to 90 days on this letter is in my handwriting. I believe this change was made in the Wells Fargo Bank when I delivered the documents there.

The documents referred to in Mr. Lyons' letter accompanied the two letters of transmittal dated October 7th, being respectively Plaintiff's Exhibits 22 and 23. They are the documents referred to in the two letters. Both sets of documents refer to the Birla Bros. shipment, both shipments going out on the steamer "Silver Hazel." Both shipments were covered by two sets of drafts, one sight draft and one 180 day draft at sight. I delivered these documents to Mr. Gilstrap at the Wells Fargo Bank on October 8, 1930. There would be four drafts, two on each shipment presented at that time under the acceptance agreement.

(Testimony of Robert L. Hall.)

I testified in my deposition that at that time no foreign drafts were presented to the bank for collection.

As stated before in the taking of my deposition I had no chance whatsoever to check any of my trips or documents. I could make no agreement for the Richfield Oil Company but it was understood that the drafts under the acceptances signed by Richfield must be in an amount equal to or slightly in excess of the amount of drafts on foreign customers. This was not an understanding, it was the instructions [252] given by Mr. Gilstrap when Mr. Pope and I were in San Francisco on October 6, 1930.

All the shipping documents and drafts were forwarded to the Wells Fargo Bank with a letter similar to the letters of transmittal marked Plaintiff's Exhibits 22 and 23 or with wording practically the same.

I don't remember whether Richfield received any further communication from the Wells Fargo Bank with respect to draft No. 43110, referred to in Plaintiff's Exhibit 116.

Defendant then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to William C. McDuffie, Receiver, dated May 12, 1931, and said letter was received in evidence and marked Defendant's Exhibit "E". Said letter referred to draft No. 43110 drawn on Birla Bros. Ltd. in the sum of $43,035.47, and stated that the remittance from the foreign correspondent had been received and that

(Testimony of Robert L. Hall.)

the receiver's account had been credited with the amount received. (It was conceded that this related to a draft deposited after the receivership and was credited to the receiver's account pursuant to an agreement with him.)

After having been notified by Mr. Gilstrap by telephone that the Wells Fargo Bank intended to take the proceeds of the 180 day drafts on Birla Bros., I went to San Francisco and called on Mr. Gilstrap at the Wells Fargo Bank and protested against this action of the bank, telling him that it was unfair to Richfield and unfair to me. I brought up every argument on the agreement which I had with Wells Fargo in regard to the separateness and distinct part of the acceptance transaction with the Wells Fargo Bank. I put it both on a business basis and on a personal basis. I stated at the argument with him that under no consideration could he exercise a bankers' lien under the acceptance agreement; that it was not included and that it could not be held under that acceptance agreement. I brought up the point of my situation, that I had the claim pending against Richfield and it ran into large figures. Mr. Gilstrap stated that it was something that was beyond his control, that it was exercised on the instructions of Mr. Lipman and that he had nothing to do with it whatsoever and that it would have to be [253] taken up with Mr. Lipman in order to have the bankers' lien removed. Mr. Gilstrap introduced me to Mr. Eisenbach and I

(Testimony of Robert L. Hall.)

told him it was unfair and unjust to me, to the Richfield Oil Company and to Mr. McDuffie. I later met Mr. Motherwell. I did not tell him that I knew the bank had a right to do this thing, but I used every argument possible as a business argument as to the injustice of using the acceptance agreement to exercise a bankers' lien. Then I went into my personal situation and asked them as a favor to me to have the bankers' lien removed.

Redirect Examination:

At the conference of May 8, 1931, I referred to the fact that the acceptances for which the drafts had been turned over to the bank had been paid in full, and the bank officials said that they knew this. I was finally told that it was absolutely impossible to have the bankers' lien removed.

In the course of my conversations with Mr. Gilstrap, he brought up that it was possible to be able to renew acceptances, but the Richfield Oil Company on renewals must place new foreign drafts to cover the amount of the renewed acceptances. Nothing was said in that conversation respecting the renewal of an acceptance agreement. Nothing was said by the bank officials to me that if the acceptances were in fact paid, new acceptances could be issued under the agreement.

On my deposition, in response to a question by Mr. Dinkelspiel, I stated that I was employed by Richfield to organize a foreign or export depart-

(Testimony of Robert L. Hall.)

ment on a guaranteed monthly drawing account and a fixed commission basis, and that that was the partnership to which I referred.

I was notified of the taking of my deposition one or two days before the steamer sailed from San Pedro. My deposition was taken in San Francisco the next morning after the boat arrived. Prior to making the deposition I had had no opportunity to refresh my recollection in any way.

Recross Examination:

After the telephone conversation with Mr. Gilstrap with [254] respect to the proceeds of the Birla Bros. drafts on May 8, 1931, I believe Mr. McDuffie immediately cabled the bankers of the Richfield Oil Company at Calcutta to stop payment to the Wells Fargo Bank on the proceeds of these drafts.

Plaintiff then offered in evidence the Proof of Claim filed by Wells Fargo Bank & Union Trust Co. in the Richfield Oil Company receivership proceeding which was entitled "The Republic Supply Company of California, a corporation, Complainant, versus Richfield Oil Company of California, a corporation, Defendant," and said document was received in evidence and marked Plaintiff's Exhibit 120. Said Proof of Claim stated that Richfield Oil Company of California was indebted to Wells Fargo Bank & Union Trust Co. in the sum of $636,189.95 for moneys loaned to the Richfield Oil Company of California, and that this indebtedness was evi-

(Testimony of Robert L. Hall.)

denced by a promissory note dated July 12, 1930, together with interest at the rate of 6% per annum. Said Proof of Claim also set out a further indebtedness in the sum of $147.67 for miscellaneous amounts expended on behalf of Richfield Oil Company. Said Proof of Claim further stated that there were no offsets or counterclaims to said debt, that no Judgment had been rendered for the indebtedness, and that no claim to preference in payment from the receiver had been made. Said proof of claim further stated that no securities were held by claimant for said indebtedness. Said document was signed by F. I. Raymond, affiant, as Vice President and Cashier of Wells Fargo Bank & Union Trust Co. The date of said document was March 28, 1931.

Plaintiff then offered in evidence a Proof of Claim filed in said receivership proceeding by Wells Fargo Bank & Union Trust Co. and said document was received in evidence and marked Plaintiff's Exhibit 121. Said Proof of Claim was signed by A. J. Callahan, Assistant Trust Officer of Wells Fargo Bank & Union Trust Co. and was dated March 28, 1931. Said document stated that Richfield Oil Company of California was indebted to Wells Fargo Bank & Union Trust Co. in the [255] sum of $1,028.85 for services rendered as registrar of the preferred and common stock of the Richfield Oil Company of California. Said document further stated that there were no offsets or counterclaims to said

(Testimony of Robert L. Hall.)

debt, that no Judgment had been rendered thereon, and no claim to preference in payment from the receiver was made except with reference to the sum of $846.50 which was represented by a check drawn by Richfield Oil Company in favor of Wells Fargo Bank and returned to the Wells Fargo Bank with the notation "Refer to Maker." Said Proof of claim further stated that no securities were held by claimant for said indebtedness.

Thereupon plaintiff rested.

DEFENDANT'S CASE.

W. J. GILSTRAP

was called as a witness for defendant and testified as follows:

I am Assistant Cashier and Assistant Manager of the Foreign Department of the Wells Fargo Bank & Union Trust Co. I have been with the Wells Fargo Bank for about 15 years and in the Foreign Department for the entire time. I was Assistant Cashier and Assistant Manager of the Foreign Department in the fall of 1930. I am familiar with the various methods of doing business of foreign exportation. Prior to the fall of 1930, we had had some business with the Richfield Oil Company of a letter of credit nature. In the course of these transactions I met Mr. Hall of the Richfield Oil Company.

(Testimony of W. J. Gilstrap.)

In the latter part of August, 1930, Mr. Hall came to San Francisco and called on me. I should say this was in the neighborhood of August 22d, or within a day or two of that time. [256] During the first part of the conversation only Mr. Hall and I were present. Mr. Hall said he was dissatisfied with the treatment he was receiving in connection with his foreign collections from the bank with which he was then placing them, and that he intended, providing we were willing to take on the business, to give us all of their collection business. I suggested to Mr. Hall that if the business was an extension of credit it might be more economically handled from Richfield's point of view by means of bank acceptances rather than by a direct discounting of foreign collections. I am positive that I suggested that to Mr. Hall and that Mr. Hall did not suggest it to me. I called Mr. Hellman, the vice president in charge of our Foreign Department, into the conversation and reviewed the conversation that had taken place between Mr. Hall and myself. Mr. Hellman suggested that rather than to state a line that he would give Richfield, provided we would give them any line, he preferred to have Mr. Lipman, the president of the bank, pass upon whether or not we would do so.

Mr. Hall made no statement to me on this occasion with respect to any interest which he had in the foreign business of Richfield Oil Company.

He made no statement to me on this occasion

(Testimony of W. J. Gilstrap.)

with respect to keeping any business of the Foreign Department separate from other business of Richfield Oil Company with the bank.

Mr. Hellman then took Mr. Hall downstairs with him. When Mr. Hall returned he stated that he had seen Mr. Lipman and that he was returning to Los Angeles to submit to his superiors for their decision the question as to whether the export business and the acceptance credit would be availed of. I was informed either by Mr. Hall or by Mr. Hellman that the amount of the line which Mr. Lipman had designated was about $150,000 in addition to the indebtedness, [257] the line which Richfield already had.

When Mr. Hall returned after his interview with Mr. Lipman he made no statement with respect to his having an interest in the foreign business of the Richfield Oil Company or that these transactions with the Foreign Department of the Richfield Oil Company were to be kept separate from other business Richfield had with the bank.

So far as I know I only remember seeing Mr. Hall on one occasion in August, 1930.

I wrote the letter, Defendant's Exhibit "D", which refers to a telephone conversation with Mr. Hall. In that telephone conversation he said that Richfield had decided to avail themselves of the acceptance credit and asked me to send down the necessary forms for their signature. The form of acceptances and the acceptance agreement were sent.

(Testimony of W. J. Gilstrap.)

On October 6th, Mr. Hall, accompanied by Mr. Pope, came to my desk. Mr. Hall told me that Mr. Pope had been sent to educate himself with every detail of the acceptance business; that it was something entirely new to him as it was also to the Richfield Oil Company, and that they wanted Mr. Pope to familiarize himself with every detail of it so that he could handle their end of the arrangement. Mr. Pope had with him the acceptance agreement marked Plaintiff's Exhibit 16 and the acceptances which are in evidence as Plaintiff's Exhibits 17 to 20 inclusive. Mr. Pope handed the acceptance agreement and the acceptances to me.

I told him that the acceptance credit which we had granted Richfield was a continuous one, that is, a revolving one, which might be availed of by them to an extent not exceeding $150,000 in acceptances outstanding at any one time; that the acceptance agreement which he had given us was intended to cover any [258] acceptances which might later be executed by us, within a limit of $150,000 outstanding at any one time; that the acceptance agreement did not stipulate the exact amount of acceptances, that is the exact amount for which each acceptance was drawn, because we did not know nor did they know nor did any one know in what amount the acceptances would be issued and when they would be issued. That would be dependent upon the collections which later would be forwarded to us. Likewise, no mention could be made, as I told

(Testimony of W. J. Gilstrap.)

Mr. Pope, of the collections which were the security for this particular credit, because for the same reason neither they nor we knew exactly what collections would later be sent us. Rather than have them have to execute a new acceptance agreement each time that a new acceptance was asked for or each time that they sent us a new collection, I explained to Mr. Pope that this one agreement was expected to be a blanket one. I also explained to Mr. Pope that the reason the drafts were to be drawn at 90 days sight was because a ninety day sight draft commands a better rate of discount in the open market than would one of a longer maturity.

In the course of that conversation I gave Mr. Hall the receipt marked Plaintiff's Exhibit 21.

As Mr. Pope said he was entirely unfamiliar with it, and as Mr. Hall indicated that he was, I explained to them in detail exactly how the acceptances would be executed by us and then how they would be used by us and discounted and the proceeds credited to the account of the Richfield Oil Company, or held at the disposal of the Richfield Oil Company, and how the acceptances would ordinarily later find their way into the hands of some investor in the open market; that the acceptances would on their due date be presented to us for payment; that as stated in the agreement the Richfield Oil Company must provide us with funds to meet the matur- [259] ing acceptances at

(Testimony of W. J. Gilstrap.)

least one day before their maturity. Those funds, of course, might come from the proceeds of collections which were the security for the acceptances, or in the event of any deficiency, that is to say, not sufficient proceeds being received at the time we would request the amount necessary to retire the acceptances in our hand, that any deficiency must be made up by the Richfield Oil Company. I did not state that the proceeds from the drafts which were security for the acceptances would have to be received in San Francisco at least one day prior to the maturity of the acceptances. I stated that the acceptances were to be paid or had to be paid by us on their due date to the holder of the acceptances, and that one day prior to the maturity of the acceptances we must be placed in funds sufficient to meet the maturing acceptances by the Richfield Oil Company.

I also explained to Mr. Pope that if for any reason the proceeds of the bills that might be deposited with us were not received by us in time to meet any maturing acceptances, the deficiency that the Richfield Oil Company might have to make good might be in part or in whole obtained by renewal acceptances either against bills which were originally put in as security for the original acceptances or against new bills which might later have been deposited; in other words, on renewal acceptances against some bills against which the first 90 day

(Testimony of W. J. Gilstrap.)

acceptances were issued, or as against any later bills that might have been deposited.

Either Mr. Hall or Mr. Pope then stated that they were preparing a shipment to Birla Bros. I believe that in some previous conversation Mr. Hall had outlined to me in a general way the business that he did with Birla Bros. They stated they wanted to raise as much money as possible against this particular shipment, and asked how much we would advance against the shipment. [260]

Defendant's Exhibit "B" was a cable received by us on October 6th from our correspondent bank at Calcutta. It was received before my conversation with Mr. Hall and Mr. Pope.

After Mr. Hall and Mr. Pope requested that we advance against the shipment as much as we could, they said that one-half of the shipment was drawn for at sight and one-half would be drawn for at 180 days after sight. I showed both Mr. Pope and Mr. Hall the report that we had received from our correspondent bank concerning the standing of Birla Bros. and told them that it was in our opinion not a good report. Mr. Hall stated that Birla Bros. were in his opinion a very good house. I told them that I could not name the amount which we would advance against the shipment and that I would have to consult with the other officials in the Foreign Department. I spoke first to Mr. Hellman. Before seeing Mr. Hall and Mr. Pope again, I spoke to Mr. Leuenberger. Mr. Leuenberger accompanied me to my desk where

(Testimony of W. J. Gilstrap.)

Mr. Hall and Mr. Pope were seated. He informed Mr. Hall and Mr. Pope that we would advance the approximate amount of the sight drafts which were drawn for fifty per cent of the value of the shipment. Mr. Hall and Mr. Pope still endeavored to have us advance more against it, but the decision as Mr. Leuenberger said was that we would advance the approximate amount of the sight drafts which amounted to about fifty per cent of the value of the shipment.

Nothing was said on the occasion of this conference with respect to 180 day paper or with respect to taking 180 day paper on any other basis than short term drafts.

Nothing was said on the occasion of this conference by Mr. Hall or by Mr. Pope that these transactions with our foreign department were to be kept separate and apart from other transactions with the Wells Fargo Bank, nor was anything said at this [261] conference that Mr. Hall had an interest in the business of the Foreign Department of the Richfield Oil Company.

I told them that acceptances would be executed by us as they were required by Richfield up to the extent of not exceeding $150,000 outstanding at any one time, provided that at the time of their request we had collections to an amount of at least the amount of acceptances outstanding and the amount that they then requested be satisfactory to us to allow of our executing additional acceptances.

There was no discussion at this conference with

(Testimony of W. J. Gilstrap.)

respect to the financial condition of Richfield Oil Company. There was no discussion of that kind in any of the conferences.

I next saw Mr. Hall two days later, on October 8th, at the Wells Fargo Bank. He brought two letters referring to four drafts—2 at 180 days and 2 at sight, on Birla Bros. with the shipping documents and a letter asking us to execute against the shipment $115,000 worth of acceptances. He delivered to me the letter marked Defendant's Exhibit "A". The original of the documents marked Plaintiff's Exhibits 22 and 23 accompanied by Defendant's Exhibit "A", were delivered to me by Mr. Hall at the same time. The 4 drafts, 2 at sight and 2 at 180 days, on Birla Bros., accompanied the letter, together with invoices referring to 2 shipments, insurance policies and original bills of lading covering each of the 2 shipments. No other documents were given to me by Mr. Hall at that time. We executed $115,000 worth of acceptances and gave Mr. Hall a credit memorandum to the account of the Richfield Oil Company showing a credit to their account in the amount of $115,000 less the discount and commission charges.

Nothing was said this morning with respect to keeping these transactions separate and apart from any other transactions [262] of the Richfield Oil Company, nor did Mr. Hall make any statement that he had some sort of an interest in the business of the Foreign Department of the Richfield Oil Company.

(Testimony of W. J. Gilstrap.)

He made no comments whatsoever with respect to Defendant's Exhibit "A".

We sent the 4 drafts with the accompanying shipping documents to our correspondent bank, Netherlands Trading Society, at Calcutta, for collection.

The Wells Fargo Bank has permanent records relating to the drafts deposited and transmitted by it to its foreign correspondent for collection. This record is a copy of the remittance letter addressed to the correspondent bank, which contains a detailed description of the drafts and the documents and everything pertaining to it. The form which we use for our collections and the blanks which we transmit are all numbered consecutively. These records are kept under my supervision in the Foreign Department. We kept records with reference to the Birla Bros. shipment.

This document which purports to be a carbon copy of a document bearing the numbers 46831, and entitled "File correspondence" is our permanent record with reference to the transmittal of Richfield Oil Company's draft No. 103006a to Birla Bros. Ltd. for the sum of $55,900.76. It is a carbon copy of our letter which was forwarded to our bank correspondent at Calcutta. The words "Security for acceptance, proceeds to Clemo" written in pencil in the right-hand corner of the document are in the handwriting of Mr. Desmond, a clerk employed in our Foreign Department. He was employed in the

(Testimony of W. J. Gilstrap.)

Foreign Department at the time this transaction took place. That entry was made at the same time this document was written and it was made under my direction. It was made at the same time as the forwarding of these drafts. [263]

At this point counsel for plaintiff was given permission to cross examine the witness on the pencilled notations which appear on this document. In this respect said witness testified as follows:

The pencilled notations were placed on these documents by a clerk in the Foreign Department by the name of Desmond. His desk is approximately 25 or 30 feet apart from my desk. His work is solely confined to foreign collections. I had knowledge of the typing on this document. I did not actually see it typed. I did not actually see Mr. Desmond or any one else write these words upon this draft. This document was never in the possession of Mr. Hall at all. It was a document prepared in the Foreign Department of the Bank after Mr. Hall had turned the drafts over to me. Eliminating the typing upon this document, it is nothing more or less than a form, and at the time this particular document was used we had a number of such forms in the Foreign Department of the bank. I do not recall having had this document in my hand after it had been typed, but I had seen the original going out to the bank.

I cannot definitely say when for the first time this particular document came under my observa-

(Testimony of W. J. Gilstrap.)

tion. I could not say whether it came within my observation within two or three months after the original transmittal letter was sent. I could not definitely say when I saw that after it was written. It is impossible for me to say now when for the first time approximately I saw this document. The first time I can definitely say I saw it was when this suit was discussed. That was possibly three or four weeks ago. I am quite sure I saw this document three or four weeks ago. When I said that I did not know when I first saw this document, I knew that I had seen it three or four weeks ago, but I did not know that that was the first time I had seen it. Until three or four weeks ago, I did not know the words appearing on this document in lead pencil had been placed on the document.

On direct examination said witness testified further [264] as follows:

I gave our counsel this document at the time we were preparing for trial on the first calling of this case. That was several weeks ago. At that time it had on it in pencil the words "Security for acceptance, proceeds to Clemo." I gave the instructions to Mr. Desmond with respect to putting that language on the document at the same time that I handed the draft to him to write the schedule.

(The foregoing testimony commencing with the words, "I gave the instructions to Mr. Desmond," was objected to by counsel for com-

(Testimony of W. J. Gilstrap.)

plainant on the ground it was incompetent, irrelevant and immaterial and not binding on complainant. Objection was overruled and exception noted.)

The original of this document is in the hands of the Calcutta correspondent. This document is the carbon copy for the bank's permanent record and is the record which is kept by the bank with respect to all collections forwarded to foreign countries. It is a custom in the Foreign Department of the Wells Fargo Bank to make notations upon the opening of a new series of transactions. This was the first transaction we had had with Richfield and I wanted to be sure there could be no mistake made about these bills being security for acceptances, and as an initial transaction we wanted to be sure to start it correctly.

(Counsel for complainant moved to strike out the foregoing testimony commencing with the words, "This was the first transaction," on the ground it was the conclusion of the witness, argumentative, and not responsive to the question. Objection was overruled and exception noted.)

Defendant then offered in evidence the document hereinabove referred to and the same was received in evidence and marked Defendant's Exhibit "F". At this point, however, the pencilled memorandum was excluded from evidence for the reason that

(Testimony of W. J. Gilstrap.)

it had not been sufficiently authenticated. (This pencilled memorandum was subsequently admitted in evidence after having been authenticated by the witness Desmond, as will hereinafter appear.) Said document was dated October 8, 1930, and bore the numbers 46831, and was denominated "File correspondence." It was a copy of a letter sent to Netherlands Trading Society stating that draft No. 103006a in the sum of $55,900.76, drawn on Birla Bros. Ltd. at sight was enclosed for col- [265] lection, and directed that when paid, remittance should be made to Chase National Bank, New York, for the credit of the account of Wells Fargo Bank. It also stated that the customer of the bank was Richfield Oil Company of California.

Defendant then offered in evidence another document similar to that marked Defendant's Exhibit "F", and the same was received in evidence and marked Defendant's Exhibit "G". Said document was in the same form as that marked Defendant's Exhibit "F" with the exception that it bore the number 46832, and referred to the 180 day draft on Birla Bros., No. 103006b, in the sum of $55,900.75. A pencilled notation to the same effect as that appearing on Defendant's Exhibit "F" was excluded, subject to further identification, as hereinabove set forth with respect to Defendant's Exhibit "F".

Defendant then offered in evidence another document similar to that marked Defendant's Exhibit

(Testimony of W. J. Gilstrap.)

"F", and the same was received in evidence and marked Defendant's Exhibit "H". Said document was in the same form as that marked Defendant's Exhibit "F" with the exception that it bore the number 46833, and referred to the sight draft on Birla Bros., No. 103004, in the sum of $63,950. A pencilled notation to the same effect as that appearing on Defendant's Exhibit "F" was excluded, subject to further identification, as hereinabove set forth with respect to Defendant's Exhibit "F".

Defendant then offered in evidence another document similar to that marked Defendant's Exhibit "F", and the same was received in evidence and marked Defendant's Exhibit "I". Said document was in the same form as that marked Defendant's Exhibit "F" with the exception that it bore the number 46834, and referred to the 180 day draft on Birla Bros., No. 103005, in the sum of $65,950. A pencilled notation to the same effect as that appearing on Defendant's Exhibit "F" was excluded, subject to further identi- [266] fication as hereinabove set forth with respect to Defendant's Exhibit "F".

(Counsel for complainant objected to introduction of the foregoing Defendant's Exhibits "F", "G", "H" and "I" upon the ground they were incompetent, irrelevant and immaterial, not binding on complainant, self-serving, and no foundation laid. Objection was overruled and exception noted.)

(Testimony of W. J. Gilstrap.)

Said witness testified further as follows:

Accompanying the original of these documents were the drafts to which the documents referred, which were sent to our correspondent in Calcutta, India.

Shortly thereafter, we began to receive certain collection items from Richfield Oil Company. The next occasion on which we heard from Richfield Oil Company was upon receipt of the letter marked Plaintiff's Exhibit 26, referring to draft No. 103009. Subsequently there was handed to us with letters of transmittal a great volume of drafts drawn upon various persons in foreign countries by Richfield Oil Company, and after receipt of the letters of transmittal we issued deposit receipts in the same form as Plaintiff's Exhibit 24. These documents contained no differentiating memoranda or language, and all drafts were in substantially the same form as the four drafts on Birla Bros. first deposited. The letter of transmittal, dated January 8, 1931, being Plaintiff's Exhibit 82, refers to the drafts drawn by Richfield on Birla Bros., No. 13107 and No. 13106 for the sum of $11,107.50 at sight and $23,607.50 at 180 days sight. These documents were received by us with the letter of transmittal in the same form as the previous letters. At that time, namely, January 8, 1931, the Richfield Oil Company had not paid the entire amount of the acceptances.

(Testimony of W. J. Gilstrap.)

About the 16th of October, 1930, at Mr. Hall's request, I went to Los Angeles. No business was transacted while I was down there. Mr. Hall showed me no list of drafts. He simply showed me the manner in which they prepared the documents, what a particular [267] man's duty was, and that they made a great effort to keep everything in as good order as it was possible to keep it.

Mr. Hall made no statement to me on that visit to Los Angeles that he had an interest in the business of the Foreign Department of the Richfield Oil Company, nor did he say anything on that occasion that all the transactions with the Foreign Department of Richfield Oil Company were to be kept separate and apart from other transactions of the Richfield Oil Company.

Referring to Plaintiff's Exhibit 28, being a letter from Mr. Lyons to us speaking about a draft reserve of $9,734.16, I understood the use of the words "Draft Reserve," although it is a term that we do not generally use. These words had not been used in any of the conferences held with the officials of the Richfield Oil Company prior to October 13, 1930. Subsequently in our correspondence with Richfield we adopted their verbiage.

Prior to the deposit of the two Birla Bros. drafts with the letter of January 8, 1931, one of which is in dispute in this litigation, nothing was said by any of the officials of the Richfield Oil Company with respect to the deposit of the drafts

(Testimony of W. J. Gilstrap.)

nor was there any correspondence or any conversations that in any manner differentiated them from any other drafts in this transaction.

I wrote the letter dated December 16, 1930, marked Plaintiff's Exhibit 93. The proceeds of the drafts therein mentioned were applied in anticipation of the earliest maturing acceptances. We use the term "anticipation of acceptances" to apply to any funds which are received by us prior to the actual maturing of the acceptances and which are to be used to meet the acceptances upon maturity. The acceptance is not actually taken in and cancelled on that date because it is in the hands of some investor in the open market. It is presented at its maturity for payment. [268]

Plaintiff's Exhibits 95, announcing receipt of the proceeds on draft No. 103010; 97, referring to receipts of draft No. 113014; 98, referring to proceeds of draft No. 103009; 99, referring to proceeds of draft No. 113013; 100, referring to the proceeds of draft No. 113001; 101, referring to the proceeds of draft No. 113023; 103, referring to the proceeds of drafts No. 123007, No. 113012, and No. 103030; 104, referring to the proceeds of drafts No. 113010, No. 113017 and No. 13007; 107, referring to the proceeds of drafts No. 113009, No. 113018 and No. 123008 and No. 103012, were all written by me, and they all refer to the collection of drafts and the application of the proceeds against acceptances. Before I wrote the letter marked Plaintiff's Exhibit

(Testimony of W. J. Gilstrap.)

107, which states, "We are holding in accordance with the notice given you by our wire of January 16th," I spoke to Mr. Hellman and after my conversation with him I wrote the letter. Thereafter Wells Fargo Bank received a telegram, Plaintiff's Exhibit 109. Thereafter we sent the telegram marked Plaintiff's Exhibit 110, and received a letter, marked Plaintiff's Exhibit 106. This letter requested that we transfer to the receiver the balance of $7,749.50. I turned that letter over to Mr. Hellman, who is vice president in charge of the Foreign Department and who within certain limitations makes decisions for the Foreign Department. After turning the matter over to him, I received instructions from him with reference to sending the proceeds to the Richfield Oil Company, and thereupon I wrote the letter which is marked Plaintiff's Exhibit 108, and accompanying that letter is an announcement that we were crediting the proceeds therein mentioned to the account of Richfield.

The proceeds of certain drafts which were paid prior to January 1, 1931, were credited to the account of Richfield. I don't remember any definite request on the part of Richfield to turn these [269] proceeds over to them. Apart from those proceeds the balance of all other proceeds of drafts were applied on account of acceptances in the order in which the proceeds were received.

On May 8, 1931, Mr. Hall telephoned me from Los Angeles inquiring as to how much it would cost

(Testimony of W. J. Gilstrap.)

to transfer the proceeds of certain Birla Bros. drafts by cable rather than by mail. I called Mr. Hall again later. Between the two calls, I saw Mr. Hellman and discussed the contents of the conversation had with Mr. Hall. I called Mr. Hall back on the telephone and told him that the bank had decided to take the proceeds of the two Birla Bros. drafts deposited on October 8th and apply them against Richfield's indebtedness. Mr. Hall said he was surprised and wanted to know if there was not some way in which this decision could be reversed. Several days later, Mr. Hall came to San Francisco and came to my desk in the Foreign Department. The substance of his conversation was to the effect: "Do you know what you are doing to me, do you know what you are doing to the Richfield Oil Company by taking these funds? I have an interest in these transactions and they were supposed to be kept separate, and I have come up here now to have these funds restored to Richfield if it is at all possible."

I told Mr. Hall there was nothing I could do and called Mr. Hellman into the conversation. Mr. Hall repeated the plea to Mr. Hellman that he had made to me. Mr. Hellman told him there was nothing he could do and I took Mr. Hall down to see Mr. Eisenbach and he repeated his plea to Mr. Eisenbach. Mr. Eisenbach, Mr. Hall and I went to Mr. Motherwell's office and Mr. Motherwell told Mr. Hall that nothing he could say would change our

(Testimony of W. J. Gilstrap.)

minds. During these conferences Mr. Hall said that he had an interest in these transactions and that they were supposed to have been kept separate. Prior to this visit of Mr. Hall's in May, 1931, these statements had never been made in my presence or to me at any time. The first [270] time I heard either of these statements was in May of 1931, on the occasion of Mr. Hall's visit to Wells Fargo Bank.

Defendant then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to William C. McDuffie, Receiver, dated May 11, 1931, and said letter was received in evidence and marked Defendant's Exhibit "J". Said letter was in the words and figures as follows:

"We refer to your bill No. 103012 drawn on Bueno y Cia., Cali, Colombia, for $2,441.00.

Several payments were made on account of this bill and there remained an unpaid balance of $471.00. This balance has now been paid and the net returns amount to $469.06, particulars as follows:

Balance paid	$471.00
Less correspondents charges	1.94
	$469.06

In accordance with our telephone conversation, we are applying this sum against your indebtedness to us.

Yours very truly,"

(Testimony of W. J. Gilstrap.)

Defendant then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to William C. McDuffie, Receiver, dated May 19, 1931, and said letter was received in evidence and marked Defendant's Exhibit "K". Said letter was in the words and figures as follows:

> "We refer to your bill No. 123014 drawn on Ricardo Valezques, Cali, for $1219.00.
>
> This bill has now been paid and the net returns amount to $1245.11 as per attached advice. We are applying this amount against your indebtedness to us.
>
> Yours very truly,"

Defendant then offered in evidence a letter from Wells Fargo Bank & Union Trust Co. to William C. McDuffie, Receiver, dated June 16, 1931, and said letter was received in evidence and marked Defendant's Exhibit "L". Said letter was in the words and figures as follows: [271]

> "We refer to your bills Nos. 103005 and 103006 B. drawn on Birla Bros., Ltd., for $63,950.00 and $58,900.75, respectively.
>
> These bills have now been paid and the net returns amount to $119,512.54, particulars as per slips attached.
>
> We are applying this amount against the indebtedness to us of the Richfield Oil Co. of California.
>
> Very truly yours,"

(Testimony of W. J. Gilstrap.)

Said witness testified further as follows:

The other 180 day Birla Bros. draft in the sum of approximately $23,000, deposited on January 8, 1931, was paid and the proceeds thereof retained in the same manner by Wells Fargo Bank.

The 2 drafts represented in Defendant's Exhibit "L", the drafts referred to in Defendant's Exhibit "J" and Exhibit "K" and the 180 day Birla Bros. draft deposited January 8, 1931, constitute the five drafts in dispute in this litigation.

Cross Examination:

Between the 8th day of October, 1930, and the 8th day of May, 1931, Wells Fargo Bank sent no communication of any kind to Richfield Oil Company or to the receiver of the Richfield Oil Company indicating that the bank was holding the 180 day sight drafts deposited with us either as security for any outside indebtedness or that the bank intended to exercise a bankers lien as against the proceeds. Wells Fargo Bank never wrote to any of the officials of the Richfield Oil Company indicating that the bank was holding either of the 180 day drafts as security under the acceptance agreements or as security for any of the acceptances, nor was there any such communication respecting the 180 day Birla Bros. draft that was deposited on the 9th day of January, 1931. There were no telegrams relating to the 180 day drafts indicating that the bank was claiming any lien upon these drafts or

(Testimony of W. J. Gilstrap.)

that these drafts were being held as security for the acceptances. In none of the frequent telephone conversations [272] occurring between me and Mr. Hall did I ever mention that the bank was claiming that any one of these three 180 day Birla Bros. drafts were being held by the bank as security under the acceptances or the acceptance agreement.

The Wells Fargo Bank keeps a book showing the amount of acceptances executed. When an acceptance agreement is accepted or received by the bank, no entry is made in any book kept by the bank showing the receipt of the acceptance agreement. There is no book kept by the bank in which is entered the security which the bank receives as security under the acceptance agreements or as security for the payment of acceptances. There are two books, one in which the liability of the various concerns is tabulated, and another which is entitled an acceptance register. The first book would show the liability of Richfield Oil Company as it drew drafts for acceptances by the bank. Aside from these two books and aside from the carbon copies of the letters of transmittal sent by our Foreign Department to our foreign correspondents, there is no record of any kind kept in the bank showing the securities, if any, that are delivered to the bank to be used under the acceptance agreement or as security for acceptances executed and released by the bank.

(Testimony of W. J. Gilstrap.)

I knew that for a considerable period prior to the months of August, September and October, 1930, the Richfield Oil Company had borrowed money from the Wells Fargo Bank, and I knew that during that period of time the Richfield Oil Company had borrowed money without putting up security with the bank. I knew that at the time these preliminary negotiations occurred to which I have testified there was a substantial indebtedness outstanding payable by the Richfield Oil Company to the bank which would mature some time during the early part of October, 1930. I knew that that indebtedness aggregated approximately $625,000. Prior to October 6, 1930, I [273] did not know of any security which the bank held to secure the payment of that indebtedness.

Mr. Hall did not visit the bank during the month of August, except upon the one occasion testified to by me. I know that that was slightly after the middle of the month. I made no memorandum of the visit paid to me on that occasion. I made no memorandum at any time with respect to the conference occurring between me and Mr. Hall. As Manager of the Foreign Department I have been kept pretty busy during the last several years. Between the date on which Mr. Hall first came to see me in the month of August, 1930, and the commencement of this trial, I have undoubtedly attended to many thousands of transactions involving transactions with the Foreign Department. I have also come in con-

(Testimony of W. J. Gilstrap.)

tact with many thousands of people with each of whom I have had conferences, sometimes lasting a considerable period.

No entry of any kind was ever made by me respecting any of these conferences with Mr. Hall from which I could refresh my recollection as to what occurred.

At the conference with Mr. Hall on August 9, 1930, I did not tell Mr. Hall that if an acceptance agreement were executed the security put up under the acceptance agreement would secure any other indebtedness that might be due from the Richfield Oil Company to the bank. I did not tell him that any securities that might be put up under the acceptance agreement, held as security for the payment of the acceptances, could be seized by the bank after the acceptances were paid to satisfy the indebtedness due from Richfield Oil Company to the bank approximating $625,000. I did not tell Mr. Hall that by placing securities of any kind under the agreement or under the acceptances, the Richfield Oil Company's indebtedness to the bank would be secured. [274]

The witness' attention was at this point called to a book of Wells Fargo Bank & Union Trust Co. produced at the demand of counsel for plaintiff, entitled "Acceptance Register." With respect to this book, said witness testified as follows:

There is nothing in this Acceptance Register indicating the character of the security that was lo-

(Testimony of W. J. Gilstrap.)

cated under the acceptances or under the acceptance agreement.

Plaintiff then offered in evidence a sheet taken from a book of Wells Fargo Bank & Union Trust Co. produced at the demand of counsel for plaintiff and entitled "Commercial Credits, Wells Fargo Bank & Union Trust Co." Said sheet was entitled "Acceptance Credit." Said document was received in evidence and marked Plaintiff's Exhibit 122. Said document showed that an acceptance credit had been entered in favor of Richfield Oil Company in an amount of $150,000. The first column on said sheet was entitled "Date Negotiated," and showed that the acceptances in the sum of $115,000 were negotiated on October 6, 1930; the acceptance for $5,000 was negotiated on October 6, 1930, the acceptance for $10,000 was negotiated on October 6, 1930, and the acceptance for $25,000 was negotiated on November 28, 1930. The next column was entitled "Ship." Underneath the first line in this column are contained the words "Silverray" and "Silverhazel." The next column was entitled "Documents Drawn Against." On the first line of this column, opposite the word "Silverray" appeared the words and figures "17.000 C/S Kerosene 540 drums fuel oil," and opposite the word "Silverhazel" hereinabove referred to, the words and figures "95.000 C/S Kerosene." The next column was entitled "Documents Received," and referred to the date of the receipt of the shipping documents. The next column

(Testimony of W. J. Gilstrap.)

was entitled "Amount Drawn," and referred to the amount of the acceptances drawn by Richfield Oil Company. It showed first the drawing of the [275] $115,000 worth of acceptances; next the $5,000; next the $10,000 worth of acceptances, and last the $25,000 worth of acceptances. The next column was entitled "Due in San Francisco." Under this column appeared the dates when the various acceptances would be due. This column showed the $115,000 worth of acceptances was due January 6, 1931; the $5,000 worth of acceptances was due on January 13, 1931; the $10,000 worth of acceptances was due on January 19, 1931, and the $25,000 worth of acceptances was due February 26, 1931. The next column was entitled "Due in London," but as hereinafter shown by the testimony of the witness, the title of this column had nothing to do with the entries thereunder. The entries under this column showed the amounts and the dates of the proceeds received and applied in anticipation of acceptances and the interest allowed upon such proceeds. The next column was entitled "Balance Available." This column showed the balance of the value of the acceptances which Richfield Oil Company of California was still entitled to draw on its credit of $150,000 after having partially utilized some of the acceptance credit. The next column was entitled "Date Paid." This column showed the dates upon which the acceptances were finally paid.

(Testimony of W. J. Gilstrap.)

Under the columns hereinabove referred to entitled "Ship" and "Documents Drawn Against", appear the words "Supported by B/C 46843" opposite the acceptance of $10,000, the shipping documents for which were received on October 21, 1930. Also under said two columns last mentioned appeared the word "Cancel" opposite the sum named under column "Amount Drawn" of $115,000. Said document is more fully described in the testimony of the witness hereinafter set forth. [276]

Said witness testified further as follows:

This sheet is not made to fit this particular individual transaction. It is a form which we used for this transaction but the sheet is not designed to fit this particular transaction. We have no sheets which fit this particular transaction, but we use this particular sheet for all such transactions. The titles on this sheet are used on certain other transactions, but in this particular case certain titles do not apply to this particular transaction.

On the first line appear the words "Silverray" and "Silverhazel". They refer to the two ships. The words "Documents Drawn Against" refer to invoices. The column "Due in London" does not apply in this case because London had nothing to do with this transaction. It is used here to put the dates and amounts and the anticipation of the acceptances. Opposite the words "Silverray" and "Silverhazel", which are the names of the ships, appears "Allowed Interest $115,000 Anticipated

(Testimony of W. J. Gilstrap.)

12/16". That means the date of the payment of the proceeds in San Francisco. Under the title "Balance Available" appears the figure $35,000. The credit that we extended Richfield was $150,000; the amount used in the first instance was $115,000; so the clerk carried forward the balance here as the amount then available to Richfield.

There is no reference on this sheet to any 180 day drafts.

The entries extended on this sheet with respect to the $5,000 acceptances are similar to the first entries with respect to the $115,000 worth of acceptances. There is nothing upon this sheet indicating the documents against which it was drawn or the security that was put up. [277]

With respect to the $10.000 acceptance, appears the entry "Supported by B/C 46843". That is our bill for collection. This entry indicates that the $10,000 acceptance was supported itself by B/C 46843. B/C46843 refers to the draft referred to in the letter of transmittal dated October 2. 1930, which was Richfield Oil Company's draft No. 103010 for $11,031.14. That portion of the amount Richfield Oil Company had available for the execution of acceptances by reason of our having that draft was used by that $10,000 acceptance. This record does not show that any draft or other security was put up for that $10,000 acceptance other than our draft No. 46843.

(Testimony of W. J. Gilstrap.)

With respect to the next transaction of November 28, 1930, regarding the acceptances for $25,000, there is no indication upon this sheet which discloses the security, if any, that was put up for the issuance of those acceptances.

All of the figures that appear in the column "Due in London" represent entries made upon receipt of proceeds in anticipation of the due date of the acceptances. The column "Date Negotiated" is intended to show the date of the draft and the column "Documents Received" is intended to show the date the acceptance was executed. The column "Amount Drawn" discloses the total amount of the acceptances executed at one time. The column "Date Paid" indicates the date of the payment of the acceptances.

With respect to the word "Cancel" which appears on this sheet, this credit was originally issued for $150,000. It was increased by the amount of $5,000, making a total amount of $155,000. The total of $155,000 was then used. With the maturity of $115,000 of acceptances on January 6th, the clerk must pass a bookkeeping entry, because this is a revolving credit, so he increased the $115,000 showing that the amount available to Richfield that is [278] here shown under this column on January 6th, is $115,000.

At the time the $5,000 acceptance was obtained, which exceeded the $150,000, it was requested that a new agreement be executed, and a new acceptance

(Testimony of W. J. Gilstrap.)

agreement was in fact executed and sent up to the bank. Richfield Oil Company never at any time requested the issuance of any acceptances after the date upon which the $155,000 worth of acceptances were paid.

The witness' attention was then called to letters of transmittal to the foreign correspondent of Wells Fargo Bank, said letters relating to various drafts of Richfield Oil Company.

Said witness testified further as follows:

These comprise all the letters of transmittal sent by the bank from the 8th day of October, 1930, to the 14th day of January, 1931.

With respect to the letter of transmittal dated October 9, 1930, relating to Richfield draft No. 103009, the bank's number being 46830, and the amount being $2,442.40, there is endorsed in lead pencil "Security for Acceptance, proceeds to Clemo". With respect to the letter of transmittal referring to draft No. 103010, our number being 46843, there is endorsed in lead pencil "Security for Acceptance, proceeds to Clemo". The same is true of the letter of transmittal referring to draft No. 103012, our number being 46945. There is no endorsement of any kind upon any one of the remainder of the letters of transmittal indicating that there was any security of any kind under any of the acceptances.

The letter marked Plaintiff's Exhibit 28 was read by me before we issued the $5,000 acceptance. Before I directed the release of that acceptance I read the

(Testimony of W. J. Gilstrap.)

words in this letter "Our records show that we have with your good bank a draft reserve of $9,734.16 against which no acceptances have been issued." I learned that [279] $9,734.16 represented the aggregate of two drafts, one for $2,442.40 and the other for $2,441.00, and the difference between the two Birla Bros. sight drafts and the $115,000 worth of acceptances issued by the bank. There was no reference in this communication to any 180 day drafts which had been deposited with the bank. After reading this letter I directed the transmission to Richfield Oil Company of an acceptance of $5,000. With that acceptance I transmitted a letter which I dictated. This letter is Plaintiff's Exhibit 29. There is nothing said in that letter about any further security being in our possession.

With respect to the letter marked Plaintiff's Exhibit 31, the acceptance which is referred to therein is the acceptance referred to in Plaintiff's Exhibit 122, amounting to $10,000, against which is the entry "supported by B/C 46843". No. 46843 referred to in our letter is the number of our transmittal letter. I did not use the word "earmarked". I know that it was supported as shown by our records by that particular draft. In response to the communication of the Richfield Oil Company, I did not indicate that there was anything wrong with the use of the word "earmarked" by Mr. Leuenberger in this letter. Mr. Leuenberger is my superior in the bank. He is an Assistant Vice President.

The only letters passing between Richfield Oil Company, so far as I recall, and the bank, in which

(Testimony of W. J. Gilstrap.)

security for acceptances is mentioned, are the letters to which I have referred relating solely to the two Birla drafts numbered 103104 and 103006a, the Velasquez draft, No. 103009, and the two other drafts No. 103010 and No. 103012. The three letters of transmittal referring to the bank's numbers 46840, 46843 and 46895 were grouped together and marked Plaintiff's Exhibit 123 for identification. The balance of the transmittal correspondence commencing with the bank's number 47291 and ending with 48629 was marked Plaintiff's Exhibit 124 for identification. [280]

Mr. Clemo is a clerk in the Foreign Department handling letters of credit and acceptances.

With respect to Plaintiff's Exhibits 22 and 23, the documents would not be delivered by our correspondent to India to the purchaser of the shipment until two things would occur: first, the sight draft would be paid in full, and second, the 180 day draft accepted. Through our correspondent we would have possession of the documents representing the shipment until the sight draft was paid in full and the 180 day draft was accepted. In San Francisco we issued some $115,000 in acceptances as against these two shipments. I knew at the time we executed and released the acceptances that the sight drafts aggregated $119,850. I knew that the only amount that could by any possibility become due upon the acceptances would be $115,000. The total liability which the bank on October 8th could suffer as a result of the release of these acceptances would only be

(Testimony of W. J. Gilstrap.)

$115,000. I knew at the time these acceptances were issued that the two drafts drawn on Birla Bros. would be payable at sight. I told both Mr. Hall and Mr. Pope that the acceptances would have to be paid by them before maturity. I knew that if the two sight drafts were not paid on presentation, our correspondent would retain for us the documents representing the shipment. I knew that before the documents would be released by our correspondent, our correspondent would have in its possession $119,850, or $4,850 in excess of the total liability of the bank upon the acceptances released on October 8th. I knew also that if the sight drafts were not paid when presented that the documents in our possession would not be turned over to the consignee. I knew that if the cargo or shipment was not taken by the consignee, the cargo would be sold and that the money coming to us would be paid. Not later than December 16, 1930, we had already received in our possession the sum of approximately $119,850.00 representing the proceeds of these two sight drafts less certain inconsequential charges, which was more than sufficient to liquidate in full the $115,000 worth of acceptances. [281]

There is nothing on the acceptance agreement wherein anything is said about a continuing guaranty or a revolving fund. We did not present to the plaintiff in this case any agreement except this form of agreement. I would not say that it is correct that upon acceptance, drafts are required only slightly in excess of the amount of the acceptances.

(Testimony of W. J. Gilstrap.)

The collections which are security for an acceptance or a line of acceptances must be at least the value of the acceptances executed, and they may be twice, five, ten or twenty-five times as much more, but they must be at least as much. What the bank desires to achieve as the result of a transaction such as this, is to be absolutely assured that acceptances will be paid when due, together with the charges.

This acceptance agreement contemplates a description of the drafts presented to the bank for acceptance. Nothing was filled in on the agreement. The agreement also contemplates that where documents are turned over to the bank as security for the acceptances, the documents themselves should be identified on the face of the agreement. The agreement contemplates on its face that the bank shall have in its possession at the time the agreement was signed and at the time the drafts were accepted and released, the documents or the security, which securities shall be designated upon the face of the agreement. The amount of acceptances outstanding could not be more than $150,000. The agreement does not say anything with respect to the amount outstanding. All of the answers which I have heretofore given with respect to the first acceptance agreement are applicable to the second agreement for $5,000.

In the ordinary acceptance transaction, the securities are in the possession of the bank when the acceptances are issued. In the ordinary case, the securities placed under the acceptance agreement

(Testimony of W. J. Gilstrap.)

are not necessarily securities upon which the proceeds can be collected in advance of the maturity of the acceptances.

I received no request or no demand from Richfield Oil Company prior to the appointment of the receiver to issue to it any acceptances in excess of $155,000. After the payment of the $115,000 [282] of acceptances, I sent no communication to Richfield Oil Company indicating to it that it could if it so desired have the benefit of additional acceptances. The bank had in its possession on December 16 a sufficient amount of money to liquidate in full any possible liability on the $115,000 worth of acceptances. Between the 16th of December, 1930, and the date of the appointment of the receiver, the Richfield Oil Company did not request the bank to issue any additional acceptances under this acceptance agreement.

On January 8, 1931, when the letter of transmittal to the Wells Fargo Bank with respect to drafts No. 13106 and No. 13107 on Birla Bros. was sent, there were still outstanding three groups of acceptances, one $5,000, another $10,000, and the other for $25,000. On that date we had in our possession moneys in anticipation of the $5,000 acceptance and the $10,000 acceptance, and approximately $2,000 or $3,000 applicable to the $25,000 acceptance. We had certain drafts which had been forwarded to our correspondent for collection which we claim were under the acceptance agreements and some of which plaintiff claims were not. In our letter of transmittal to our correspondent with re-

(Testimony of W. J. Gilstrap.)

gard to these drafts on Birla Bros. (Nos. 13106 and 13107) there were no lead pencil marks. Upon presentation of the sight draft, it was paid and the proceeds came back to San Francisco. Upon receipt of the proceeds of the sight draft in the sum of $11,107.50, without any request from the receiver or official or employee of the Richfield Oil Company, the bank credited the account of the receiver with the net proceeds of the draft. With respect to the proceeds of drafts which were received by the bank prior to the appointment of the receiver and deposited to the account of the Richfield Oil Company, nobody connected with the Richfield Oil Company requested us to deposit these proceeds to their account. To my knowledge there is no correspondence on this subject. With respect to the proceeds of those drafts [283] which were deposited prior to the receivership and which proceeds were received by the bank after February 26, 1931, credited to the account of the receiver without claim of offset, no request of any kind came from the receiver or any employee of the Richfield Oil Company or from any employee of the receiver requesting the credit of those moneys to the receiver's account. The net proceeds derived from these drafts amounted to $26,464.13. Out of the drafts which were sent by the Richfield Oil Company prior to the appointment of the receiver to Wells Fargo Bank, whether for collection or whether as security, we turned over to the Richfield Oil Company $5,255.86 and to the receiver $26,464.13, aside from the balance of $7,700.00 hereinafter referred to.

(Testimony of W. J. Gilstrap.)

I knew that on the 15th day or the 16th day of January, the bank exercised what it claimed to be its right of setoff against the funds of Richfield in the bank. These funds were subsequently restored. To my knowledge the bank did not during January, 1931, attempt to exercise its alleged bankers lien upon any of the drafts deposited with the bank for collection.

(The foregoing testimony commencing with the words "To my knowledge" was objected to by counsel for defendant on the ground it was incompetent, irrelevant and immaterial and the opinion and conclusion of the witness. Objection overruled and exception noted.)

The bank could not issue acceptances based upon the open credit of the Richfield Oil Company nor was it the bank's intention so to do. The acceptances that the bank was then releasing were intended to be accepted and released upon some security. If the transaction had not been a continuing or revolving one the bank would only have required security which was satisfactory to the bank for the acceptances actually released.

(The foregoing testimony commencing with the words "If the transaction" was objected to by counsel for defendant as hypothetical. Objection overruled and exception noted.)

Ordinarily if the bank had received a sight draft for $4,850.00 in excess of the acceptances accepted and released secured [284] by a shipment, the value of which amounted to nearly a quarter of a million

(Testimony of W. J. Gilstrap.)
dollars, the bank would have been properly secured for the $115,000.00 of acceptances released. Of course, it would depend upon the nature of the transaction.

(The foregoing testimony was objected to by counsel for defendant as speculative, hypothetical, incompetent, irrelevant and immaterial, and calling for the opinion and conclusion of the witness. Objection overruled and exception noted.)

In none of the conversations which occurred between me and Mr. Pope or Mr. Hall or any official of the Richfield Oil Company, was any mention made that any part of the $625,000 indebtedness would be required to be paid to the bank out of the proceeds of any of the drafts. The indebtedness of $625,000 was never mentioned by me or by any other official of the bank in my hearing, in the discussions with Pope or Hall. I did not read over the acceptance agreement paragraph by paragraph with either Mr. Hall or with Mr. Pope. That part of the agreement which refers to any indebtedness except the indebtedness to be created as the result of the acceptance and the issuance and release of acceptances was not referred to either by me or any other official of the bank in the presence of Mr. Hall and Mr. Pope or either of them.

On the 26th day of February, 1931, the $25,000 acceptance was paid, satisfying in full all acceptances issued under both of the acceptance agreements. My testimony with respect to the fact that

(Testimony of W. J. Gilstrap.)

there was no discussion of the contents of the first acceptance agreement applies also to the second acceptance agreement. The $625,000 indebtedness was never mentioned by myself or any other official of the bank in my presence and hearing to Mr. Hall or Mr. Pope at any time until May 8, 1931, nor was the fact mentioned that in the event that indebtedness of $625,000 would mature and was not paid that any of the other obligations under the agreement would become due or payable. We had collected the proceeds of certain drafts which, after applying $1,499.70 thereof to the extinguishment of the $25,000 worth [285] of acceptances, left in our hands $7,749.58. I then wrote the letter dated February 26, 1931, marked Plaintiff's Exhibit 107. Up to that time no request had come from anybody connected with the Richfield Oil Company to have these funds credited to the account of the receiver. When I dictated this letter I had in mind our telegram of January 16th. I stated in the letter that I was holding the remainder of the proceeds in accordance with the notice given by that telegram. I then received from the receiver the wire marked Plaintiff's Exhibit 109, asking me to repeat the bank's wire of January 16th. I then sent the wire marked Plaintiff's Exhibit 110 to the receiver, which included a copy of the bank's wire of January 16th. After sending this telegram I received from the receiver the letter marked Plaintiff's Exhibit 106, advising us that all banks had transferred

(Testimony of W. J. Gilstrap.)

the total amount of deposit to the credit of the Richfield Oil Company, and requesting the credit of the remainder of the proceeds in the sum of $7,749.58 to the account of the receiver. I then wrote to the receiver the letter dated March 5, 1931, marked Plaintiff's Exhibit 108, stating that in accordance with the request of the receiver we were crediting the account of the receiver with the sum of $7,749.58. Before that letter was written there was considerable discussion, but not with anybody connected with the Richfield Oil Company. It was also stated in the letter that we were crediting the receiver's account with $11,082.51 which represented the proceeds of the sight Birla Bros. draft deposited with the bank the 9th of January, 1931. There was no request for that sum from the receiver or from anybody else. From the time that we returned the $7700 and credited the receiver's account with $11,000, until the 8th of May, we collected from time to time outstanding drafts which had been deposited with us prior to the date of the appointment of the receiver, and credited the net proceeds to the account of the receiver without having any conversation with any official of Richfield Oil Company or the receiver or any [286] representative of the Richfield Oil Company or the receiver.

Outside of the telegram of January 16th and outside of the action of the bank in setting off the cash balance in its possession to the credit of the Rich-

(Testimony of W. J. Gilstrap.)

field Company at the time the receiver was appointed and outside of the letter which has been marked Plaintiff's Exhibit 107, the bank to my knowledge did not exercise or attempt to exercise any alleged bankers' lien or setoff against the drafts or proceeds of drafts or any of the property in its possession or under its control prior to May 8, 1931.

(The foregoing testimony commencing with the words "Outside of the telegram" was objected to by counsel for defendant on the ground that it was incompetent, irrelevant and immaterial. Objection overruled and exception noted.)

Shortly after the telephone conversations of May 8, 1931, Mr. Hall came to San Francisco. He told me that it had been the understanding that these funds should be kept separate and apart from other transactions of the bank. He made the same statement to Mr. Hellman, Mr. Eisenbach and Mr. Motherwell. At that time Mr. Lipman was in New York. Mr. Hall stated at that time that he had an interest in the transaction. That is the first time that he asserted that.

Up to the time that I sent the letter of December 16, 1930, marked Plaintiff's Exhibit 93, in which we notified Richfield of the receipt of the proceeds of the two Birla Bros. drafts, Nos. 103004 and 103006a, no reference had been made by us to the

(Testimony of W. J. Gilstrap.)

180 day drafts. Nothing was said in our letter of January 3, 1931, Plaintiff's Exhibit 95, referring to the receipt of the proceeds of draft No. 103010 in the sum of $11,031.14, regarding the two 180 day drafts.

At no time did we ever send any communication to the Richfield Oil Company or to the receiver in which we stated that the acceptance agreements or either of them contemplated a continuing or revolving credit, nor did the bank receive any such communication from Richfield Oil Company. After October 8, 1930, no conversation upon that subject occurred between myself and Hall or Pope. That subject [287] was not alluded to during the August visit of Mr. Hall. The only time it was mentioned was during the visit of Hall and Pope on the 6th of October, 1930.

Nothing was said regarding the 180 day drafts in our letter of January 6, 1931, marked Plaintiff's Exhibit 96, in which we informed the Richfield Oil Company that the $115,000 worth of acceptances had matured.

After the last $25,000 worth of acceptances were paid in full on February 26, 1931, we did not communicate with the plaintiff or with the officials of the Richfield Oil Company at any time prior to May 8, 1931, with reference to the 180 day drafts.

Redirect Examination

Referring to Plaintiff's Exhibit 122, the first entry under the date of October 6th and in the

(Testimony of W. J. Gilstrap.)

column "Documents Drawn Against", is the name of the boat "Silverray", and then the statement "17.400 cases of kerosene and 540 drums of fuel oil". Then the name "Silverhazel" and "95.000 cases of kerosene". The "Silverray" and "Silverhazel" refer to the names of boats. The 95.000 cases of kerosene refer to the shipment which went forward on that boat, represented by two sets of drafts, sight and 180 days sight. The statement "17,000 cases of kerosene 540 drums of fuel oil" is the shipment which went forward on the "Silverray". That is represented by two drafts, one sight and one at 180 days sight. The first entry on the page shows the initial acceptance of October 6th as drawn against the two shipments on the "Silverray" and the "Silverhazel". There are no drafts designated on the sheet. These entries refer to shipments to Birla Bros. covered by shipping documents which were transmitted by the letters of October 7th, Plaintiff's Exhibits 22 and 23.

The column entitled "Due in London" has no reference to the actual matter contained below it in this case. In this column are mentioned two things; first, the payments that we received in anticipation of acceptances; and second, several memoranda in regard to the [288] interest that we allowed the Richfield Oil Company on these anticipations. The interest and the payments received are shown in that entire column, and if added up will total ex-

(Testimony of W. J. Gilstrap.)

actly $155,000. In the column entitled "Balance Available", the first entry is $35,000. That represents the difference between the $150,000 credit and the $115,000 first drawn against. When the $115,000 acceptance was executed the balance available of $35,000 was placed in there. When the $5,000 acceptance was executed the balance was likewise carried forward reducing it to $30,000. When the $10,000 acceptance was executed the reduction was made and the balance available was then shown at $20,000. On November 28th, the Richfield Oil Company exceeded the original $150,000 by an additional $5,000 and it was necessary to increase the then balance available by $5,000. That was the time the new acceptance agreement was made. So the balance then shows as $25,000 available. When the last $25,000 worth of acceptances were executed, the balance was entirely wiped out and a zero was shown here, that is, there were no further funds available until some of these acceptances matured and were paid. The last entry is that of January 6th. That was made when the $115,000 in acceptances matured. $115,000 is then shown as available by Richfield. The last entry is the word "Cancel January 17, $115,000", entirely wiping out the possibility of this credit being availed of. That entry was made several days after the appointment of the receiver when this credit was withdrawn.

The first time that I had heard the words "Draft Reserve" was upon receipt of Plaintiff's Exhibit 28,

(Testimony of W. J. Gilstrap.)

the letter from the Richfield Oil Company, stating that they had a "draft reserve" of some $9,000 odd. These were words which I understood, but which had not been used in this transaction or suggested by me.

Said witness' attention was then called to some pencilled notations appearing at the bottom of the letter of Richfield Oil Company to Wells Fargo Bank & Union Trust Co. dated October 13th, and marked Plaintiff's Exhibit 28. These notations were in the form and in the words and figures as follows: [289]

"Calcutta		st	55900.76	Calcutta	180 d/s 55900.76
"		"	63950—	"	" 63950— "
Cali	60 d s	DA	2442.40		
La Paz		st	11031.14		
Cali	60 d s	DA	2441—		

With respect to said notations said witness testified as follows:

Upon this letter there are some pencilled notations in my handwriting. They were placed there when this letter was received and prior to my reply of October 15, 1930, Plaintiff's Exhibit 29. These figures represent all of the drafts which we had up to that time received from Richfield Oil Company. The computation of the so-called draft reserve is made from the figures on that paper. The second column represents only the two 180 day sight drafts, and the first column, all of the other drafts that we received from the Richfield Oil Company. I checked the Richfield Oil Company's figures of the so-called

(Testimony of W. J. Gilstrap.)

draft reserve by totalling the first column and subtracting therefrom the amount of the acceptances which had then been executed.

(The foregoing testimony commencing with the words, "Upon this letter there are" was objected to by counsel for complainant on the ground it was incompetent, irrelevant, and immaterial, not binding on complainant, hearsay and on the ground the letter was offered as a communication only without reference to the pencil notation. Objection was overruled and exception noted.)

Referring to Plaintiff's Exhibit 122, to and including the entry "Supported by B/C 46843", the only drafts which had been received by Wells Fargo Bank & Union Trust Co. were drafts set forth in my pencil memorandum appearing on Plaintiff's Exhibit 28.

When I handed the first four Birla Bros. drafts to the clerk in charge of the foreign collections, who is Mr. Desmond, I told him we were advancing the Richfield Oil Company against the collections certain amounts by means of acceptances, and that I wanted him to be sure to make a proper memorandum so that the proceeds of these collections when they were received would be handed to Mr. Clemo, the man who handled the acceptance finances.

(The foregoing testimony commencing with the words, "When I handed the first" was objected to by counsel for complainant on the

(Testimony of W. J. Gilstrap.)

[290] ground it was incompetent, irrelevant and immaterial, not binding on complainant, and hearsay. Objection was overruled and exception noted.)

That was the first transaction with Richfield. It is true that the proceeds of some of the earliest drafts deposited were not received in San Francisco until after the maturity of the acceptances. There were three items that were outstanding longer than ninety days. These were draft No. 103009 for $2,442.40 drawn on Ricardo Velasquez, deposited October 9th and paid January 28th; draft No. 103012, drawn on Bueno y Cia for $2,441, deposited October 12th, on which three partial payments were received, the first on February 24th and the last on April 11, 1931, the two final payments of which were received after the last maturity date of acceptances; and draft No. 103023, drawn on Sociedad Automovilia in the sum of $779.10, deposited October 21, 1930, which was never paid.

A draft drawn at 60 days sight would be payable 60 days after the drawee accepted it, which would be upon its presentation to him in the city of his residence. Before the proceeds could get to San Francisco, time would have to be allowed for transmitting the draft to the place where the drawee was and time also for the transmittal of the proceeds back and whatever time was consumed in presentation and receipt of proceeds by the correspondent bank. The time of the mail to Cali is estimated at 16 days, and to La Paz, 23 days.

(Testimony of W. J. Gilstrap.)

Referring to Plaintiff's Exhibit 122, the proceeds of draft B/C 46843 (Plaintiff's Exhibit 27, Richfield's No. 103010) together with the $119,626.05 received on December 16th in payment of Birla Bros. drafts were used to pay the $130,000 in acceptances maturing beginning January 6th to 19th. There was a balance in excess as the result of the total of $119,626.05 and the proceeds of said draft—leaving $617.12 which was carried forward to apply on the next maturing acceptance. The proceeds of this draft were applied in part upon other acceptances than the acceptance of $10,000 issued on October 21st.

The Richfield Oil Company was at all times during the course [291] of these transactions advised of the maturity dates of the acceptances.

Plaintiff's Exhibit 29, which refers to the issuance of the acceptance for $5,000, shows the maturity date of this acceptance.

Plaintiff's Exhibit 31, which relates to the acceptance for $10,000, sets forth the maturity date of this acceptance. The maturity date of the $25,000 worth of acceptances, confirmed in our letter, Plaintiff's Exhibit 35, is set forth in that letter. As to the $115,000 worth of acceptances in our letter marked Plaintiff's Exhibit 96, we informed Richfield Oil Company of the maturity of these acceptances.

It is fair to state that from the time of the issuance of the acceptances and to and including the

(Testimony of W. J. Gilstrap.)

respective maturities thereof, the Richfield Oil Company was at all times advised of the maturity dates upon the acceptances.

Recross Examination

With respect to Exhibit 122, referring to the $10,000 acceptance supported by B/C 46843, I was not in San Francisco on the date upon which the acceptance was issued. I was not in San Francisco on the date on which the draft itself was received. It was received by the 10th of October. I cannot remember whether Mr. Desmond handed that particular draft to me or whether he personally saw the transmittal letter which went forward to our correspondent. I have no recollection at the present time as to whether that particular transaction was discussed between me and Mr. Desmond.

At no time did the bank send a communication to the Richfield Oil Company indicating that the Richfield Oil Company had the right if it saw fit to have additional acceptances accepted by the bank and released upon securities theretofore received by the bank. [292] At no time did the bank ever send a communication to the Richfield Oil Company stating that either one of these two acceptance agreements was a continuing acceptance agreement or acting as security for any so-called revolving fund.

With respect to my pencilled notations on Plaintiff's Exhibit 28, there is nothing appearing on the

(Testimony of W. J. Gilstrap.)

face of the letter itself in lead pencil indicating that one group or the other group of the drafts was under the acceptance agreement. No copy of these lead pencil marks upon this letter was ever sent to Richfield Oil Company, nor was any official or employee of the Richfield Oil Company shown this original communication after I had placed the marks upon it.

With respect to Plaintiff's Exhibit 37, which contains a letter from Wells Fargo Bank to Richfield Oil Company requesting an additional $5,000 acceptance agreement from Richfield Oil Company, and which contains a letter from Richfield Oil Company to Wells Fargo Bank stating that the additional acceptance agreement was enclosed, and which stated, "In the future we will forward these agreements with the acceptances issued", we never responded to that letter and informed either Richfield Oil Company or any of its employees that no additional acceptance agreement was necessary in the event that additional acceptances were issued after the payment of any of the acceptances previously issued.

I knew that the sight drafts which had to be paid before the documents would be delivered to Birla Bros. would in all probability be paid prior to the date of the maturity of the $115,000 worth of acceptances.

The character of the paper taken under acceptances is not necessarily paper which would mature

(Testimony of W. J. Gilstrap.)

prior to the date upon which the acceptances themselves would mature. It is necessary for ac- [293] ceptances to be paid when they mature. The acceptances frequently find their way into the possession of persons other than the bank by which the acceptances are issued, and these persons expect to be paid upon the maturity date of the acceptances.

In so far as the 180 day sight drafts of Birla Bros. were concerned, they were unsecured as to any merchandise cover after the delivery to Birla Bros. of the documents representing the two shipments. They were clean paper at that time and there was no security behind them except the signature of Birla Bros. and the signature of the Richfield Oil Company.

When the $115,000 of acceptances had been extinguished by payment, the Richfield Oil Company could have obtained an additional credit of $115,000 represented by new acceptances provided that we had in our hands collections which would allow of our renewing the acceptances. Eliminating from consideration any other drafts that had been deposited with us, I would not have executed $115,000 of new acceptances based exclusively upon the 180 day sight drafts, that is, in so far as it is in my power to make any credit advances. An acceptance is issued against the movement of a shipment. It may have been already made; at least the shipping documents may have been already filled in. The

(Testimony of W. J. Gilstrap.)

bank issues acceptances based upon paper accepted by the consignee of a shipment where shipment has already been made and where the consignee is already in possession of the goods shipped. It depends upon the financial stability of the drawer and the drawee of the paper. In this case it would be the Richfield Oil Company and Birla Bros. Birla Bros. were not regarded by us as a firm of any financial stability.

The 180 day sight drafts could not have become due until some time in May, 1931. The $115,000 worth of acceptances matured on January 6, 1931. If the Richfield Oil Company had applied for and had actually obtained an additional acceptance aggregating $115,000 on January 6, 1931, those acceptances would have matured [294] on or before the 6th day of April, 1931, some considerable time in advance of the date upon which the 180 day drafts would have become due by their terms.

I knew on October 8, 1930, that upon the payment of the sight draft and the acceptance by Birla Bros. of the two 180 day sight drafts, the goods were to be delivered to Birla Bros.

Further Redirect Examination

If the sight drafts had not been paid, we would then have had an advance to the Richfield Oil Company on these acceptances of $115,000, and as security for that, the shipment to Birla Bros.

(Testimony of W. J. Gilstrap.)

Further Recross Examination

If the sight drafts had not been paid and the cargo had been at Calcutta, we would have first called on the Richfield Oil Company for payment of any acceptances then outstanding, and if that were not done we probably would have disposed of the cargo, and reimbursed ourselves to the extent of the acceptances from the proceeds of the cargo. It often occurs that if no paper taken by the bank is payable before the date of the maturity of the acceptances, the bank issuing the acceptances is unable to collect in advance of the maturity of the acceptances, even though the bank and the depositor assume at the time of the transaction that the proceeds of the drafts placed under the acceptances will be paid in advance of the maturity of the acceptances. In those instances, the concern to which the acceptances are released makes up the deficit.

Further Redirect Examination:

The letter of Wells Fargo Bank to Richfield Oil Company contained in Plaintiff's Exhibit 37 calls for a new $5,000 acceptance agreement and acceptance, because as stated in the letter, the $150,000 loaned them on the first acceptance agreement had been exceeded. [295]

It was not my function in 1930, nor it is now, to pass on credit or on advances to customers or on what security advances can be made.

WILLIAM DESMOND

a witness then called on behalf of defendant testified as follows:

Direct Examination:

I am a clerk in the employ of Wells Fargo Bank & Union Trust Co. I have been employed by the Wells Fargo Bank for approximately 13 years. In the year 1930, I was employed in the Foreign Collection Department. Mr. Gilstrap was my immediate superior. I was in the Foreign Department about a year. I am no longer in the Foreign Department.

I had charge of the Foreign Collection Department which took care of the documents for export shipments and I supervised that end of it. The transmittal of drafts to foreign correspondents was part of my duties.

The document entitled Defendant's Exhibit "F" is our file record evidencing the forwarding of the drafts, and is a carbon copy of a letter of transmittal. The handwriting in pencil on the right hand side of the document, "Security for Acceptance, proceeds to Clemo", is my handwriting. I put that handwriting on the document at or about the same time that these documents were sent forward with the letter of transmittal. The date of this document is October 8th. The original of this document was transmitted on the same day, October 8, 1930. I put this writing on the document at the request of Mr. Gilstrap. He told me to put

(Testimony of William Desmond.)

that statement on several bills there and that the proceeds of those documents were security for acceptances and were to be handed [296] to Mr. Clemo. The pencilled notations on each of Defendant's Exhibits "G", "H" and "I" in each case are in my handwriting. These notations were placed upon each of these documents on or about the date of the document pursuant to the instructions of Mr. Gilstrap.

Cross Examination:

The last time I was employed in the Foreign Department was about the end of the year 1930. I was in the Foreign Department approximately one year. I had routine work to do taking care of export shipments regardless of any specific instructions. My time was fully occupied during working hours in taking care of the business in connection with which my attention was required. After my separation from the Foreign Department I was assigned to a separate and distinct department and since then I have had nothing to do with the Foreign Department. There were a number of officers of the bank connected with the Foreign Department and I was subject to the directions and instructions of all of them. From time to time I took instructions not only from Mr. Gilstrap but likewise from other officials of the bank connected with that Department.

Aside from the pencilled memorandum on this

(Testimony of William Desmond.)

paper I never made any memorandum as to any instruction given to me by Mr. Gilstrap. The first time that I saw these documents after the date on which these entries were made was last evening. During the time I was connected with the Foreign Department I handled many thousands of copies of letters of transmittal. I received various instructions from time to time from my superior officers with respect to my duties. It is possible that these instructions if added together would be more than a thousand instructions during the time that I was in the Department. After separating myself from the Foreign Department I paid no further attention to the business of [297] the Foreign Department. I would say that I now have an independent recollection of substantially the majority of the instructions I received respecting work to be performed by me while I was in the Foreign Department. I wouldn't say that I could substantially tell the instructions and by whom they were given with respect to every transaction given my attention.

I dictated these letters of transmittal to a stenographer. I made the endorsement on these drafts on the date of the bills. These endorsements were made on the 8th day of October, 1930. My testimony is that they were made on that date and not on or about that date. After the letters were typed, I turned them over to Mr. Gilstrap. The copies

(Testimony of William Desmond.)

were filed. I turned over the original of the letters of transmittal to Mr. Gilstrap. Mr. Gilstrap never had in his possession so far as I knew any one of the four documents in evidence.

I have an independent and distinct recollection of the conversation occurring between myself and Mr. Gilstrap. I can give the sum and substance of it; possibly I cannot give the exact words. He told me, "Mr. Desmond, these bills are going forward to the respective parties and the proceeds are to be marked 'Security for Acceptance, proceeds to Clemo' ". There were 6 or 7 bills at first. I placed this endorsement upon the first 6 or 7 letters of transmittal.

I saw two or three of these papers last night. I did not talk to Mr. Gilstrap about this matter to refresh my recollection. Mr. Dinkelspiel asked me if this was my handwriting. Mr. Dinkelspiel did not mention any conversation occurring between me and Mr. Gilstrap. I had no conversation with any employee or official of the bank. I only talked to Mr. Dinkelspiel. Mr. Dinkelspiel merely asked me at whose instance I put this endorsement on there. Mr. Dinkelspiel only showed me two or three of these documents last night. Mr. Dinkelspiel told me that Mr. Gilstrap claimed that he had instructed me to place that endorsement upon those drafts. [298]

Mr. Gilstrap gave me one instruction to put the endorsements upon the first several bills.

(Testimony of William Desmond.)

I know that before the sight drafts could be paid the draft would have to go to Calcutta; that before the proceeds would be received at the bank they would have to return from Calcutta to San Francisco; that the 180 day drafts would not be paid for at least six months plus the necessary time for the bill to be presented at Calcutta for acceptance; and that the proceeds of the 180 day draft when received would have to be transmitted from Calcutta to San Francisco. Knowing that in all probabality the proceeds would not reach San Francisco for eight or nine months thereafter, I made these endorsements on the letters of transmittal. I made no entries in any other book that any of these drafts were under the acceptances. The documents upon which these pencil memoranda are made are kept in the correspondence files in an ordinary filing cabinet in the filing department. When Mr. Gilstrap handed the letters of transmittal to me he did not identify the specific bills by number, by date, by period or by amount.

The letters of transmittal were typed by the stenographer after I had received the instructions from Mr. Gilstrap. It was not necessary that I have the stenographer type on the carbon copies of letters of transmittal the fact that bills were being held as security for acceptances.

Redirect Examination:

The words "Security for Acceptance" did not

(Testimony of William Desmond.)

appear upon the original letters of transmittal to the correspondent in India.

(The words "Security for Acceptance" on each of defendant's exhibits "F", "G", "H", and "I" were here offered and received in evidence as parts of said exhibits, over objection of counsel for complainant that they were incompetent, irrelevant and immaterial, hearsay, and not binding on complainant. Objection was overruled and exception noted.)

EMIL LEUENBERGER

was then called as a witness for defendant and testified as follows: [299]

I am Assistant Vice President and Manager of the Foreign Department of the Wells Fargo Bank & Union Trust Co. I am familiar with various matters of the foreign business of depositors and customers of banking institutions, and I am familiar with acceptance agreements and bank acceptances.

I first met Mr. Hall during the latter part of August, 1930. I stepped out of a conference and saw Mr. Hall sitting at Mr. Gilstrap's desk. Mr. Gilstrap called me over and introduced me to Mr. Hall, who then told me that he was dissatisfied with the bank in Los Angeles and he desired to turn his foreign collection business over to us.

Nothing was said in my presence with respect to

(Testimony of Emil Leuenberger.)

partment business of the Richfield Oil Company. Nothing whatever was said by Mr. Hall with respect to the fact or the desire on his part that the foreign department business should be kept separate and apart from other business of the Richfield Oil Company with the Wells Fargo Bank.

In October, 1930, I received a telephone call from Los Angeles from Mr. Eisenbach, Vice President of our bank. He asked me to secure a credit report on Birla Bros. of Calcutta. I inquired for the report through our Calcutta correspondent, the Netherlands Trading Society. I received the cable marked Defendant's Exhibit "B" in reply.

I met Mr. Hall again on or about October 6, 1930. Mr. Gilstrap came into my office and asked me to step out and talk to the officials of the Richfield Oil Company about these shipments to Birla Bros. Mr. Gilstrap discussed with me the question of an advance to the Richfield Oil Company on the Birla Bros. transaction on the basis of acceptances. I stepped out and Mr. Hall introduced me to Mr. Pope, saying that Mr. Pope was an assistant who had come up to [300] San Francisco to get acquainted with the acceptance business. Mr. Hall then said, "We have a large shipment to Birla Bros., we are going to draw against this shipment to the extent of 50% at sight and 50% at 180 days sight, and we would like to get as much money as possible on this shipment." I said to Mr. Hall, "We cannot advance you the full amount of this

(Testimony of Emil Leuenberger.)

shipment, first because a large amount is involved, considering that the drafts are drawn on one and the same party; and second, the report that we have received of Birla Bros. is not favorable; we will, however, extend to you an advance to the extent of the sight draft of 50% of the value of the shipment." That is all that was said then.

Neither Mr. Hall nor Mr. Pope nor Mr. Gilstrap made any statement in my presence on the occasion of this conference on October 6th to the effect that Mr. Hall had any interest in the business of the Foreign Department of the Richfield Oil Company. There was no such statement made at any time in my presence. No statement was made either by Mr. Hall or by any one else in my presence that the transactions with the Foreign Department were to be kept separate and apart from other business and affairs of the Richfield Oil Company.

After this conference, Mr. Pope and I went to lunch and I explained to him the mechanics of the acceptance credits and took particular care to mention the credits that they contemplated with us. I told him about the acceptance credits, and about the revolving nature thereof and about the security of these collections. It is fair to state that Mr. Pope appeared to be substantially ignorant of acceptances and transactions under acceptance forms.

The letter marked Defendant's Exhibit "A", addressed to me, was shown to me after Mr. Hall's visit on October 8th, on which visit I did not see him. [301]

(Testimony of Emil Leuenberger.)

Cross Examination.

I have been the Manager of the Foreign Department of the Wells Fargo Bank for approximately three years. Before becoming Manager, I was for a period of approximately three years Assistant Manager of the Foreign Department. As Assistant Manager, I was constantly kept busy in the performance of the duties which devolved upon me in that capacity, and these duties became extended and enlarged after I became the Manager of the Foreign Department. During my office hours I am constantly occupied in taking care of the responsibilities incident to the office which I occupy. I do not always, but I generally, remember the conferences which I have had with the officials of the bank or with persons doing business with the bank during the past two to five years. I attend to and supervise a great many transactions every day. During the course of a month these transactions aggregate a great number. Between the month of October, 1930, and the present time, I have handled many thousands of transactions; and during that period of time I have come in contact with many thousands of customers and patrons of the bank. I do not undertake to charge my memory with each particular transaction and with what occurred in connection with each transaction. I made no memorandum concerning the conversations occurring between myself and Mr. Hall, and there is no memorandum in existence from which or by which I could refresh my recollection respecting either the conversation itself or the substance of the conversation. I have talked with Mr.

(Testimony of Emil Leuenberger.)

Gilstrap about this, and have discussed the matter to some extent with Mr. Hellman and with our attorneys. I read the letters introduced in evidence before the trial of this case commenced. In this way and by recourse to the various documents, I have endeavored to rebuild my recollection, which to some extent had faded until this case was being prepared for trial. [302]

I was in the presence of Mr. Hall about two minutes in August of 1930. I was engaged in a conference at the time and after talking to Mr. Hall I left and returned to the conference in which I had been engaged. I cannot say now who were present at this conference. I cannot say what the transaction was which was the subject matter of the conference. This conference lasted possibly an hour, although I have no definite recollection on it. I knew at the time I first met Mr. Hall in August of 1930 that the Richfield Oil Company was indebted to the Wells Fargo Bank in the sum of $625,000 and that that obligation was unsecured. I knew further that the obligation was outstanding.

I next saw Mr. Hall on October 6th. I fix that date from letters. I made no memorandum as to the subject matter of the conference or the substance of the conference occurring between me, Mr. Hall and Mr. Pope. I was with Mr. Hall and Mr. Pope approximately 10 minutes. I do not know with whom I last conferred that morning before Mr. Gilstrap called me into this conference. I do not know to

(Testimony of Emil Leuenberger.)

what particular business I was giving my attention at the time Mr. Gilstrap invited me into the conference with Mr. Hall and Mr. Pope. I cannot say with whom I next conferred after leaving Mr. Hall and Mr. Pope. I cannot give the subject matter of any business transacted by me in the bank on that day aside from the conference with Mr. Pope and Mr. Hall.

During the time that I was with Mr. Hall and Mr. Pope, the fact was not mentioned that if any acceptance agreement was entered into, that agreement might confer upon the bank security for its outstanding obligations.

On October 21, 1930, I received the letter marked Plaintiff's Exhibit 30. Mr. Gilstrap was in Los Angeles when this letter was received. The matter was turned over to me. I learned from the letter that draft No. 103010 had been sent to the bank and that Richfield Oil [303] Company was requesting that we issue an acceptance for $10,000. I wrote a response which is in evidence as Plaintiff's Exhibit 31, stating that we had executed the acceptance for $10,000 and credited the account of Richfield Oil Company with the proceeds and stating further that we had earmarked the same against our collection No. 46843 on La Paz, Bolivia. This was the only acceptance which I personally issued. This was at a time when undoubtedly my recollection was better so far as these matters are concerned than it is at the present time. The only

(Testimony of Emil Leuenberger.)

correspondence concerning any of those transactions with which I had anything to do is reflected and represented exclusively by these two letters.

At the time of my conversation with Mr. Hall and Mr. Pope on October 6, 1930, I did not see the acceptance agreement. They told me they were arranging for a shipment to Birla Bros. They told me the approximate amount of the shipment. They told me that the Richfield Oil Company wanted to get as much money as possible upon the acceptances. From the explanation they made to me at that time I knew that the documents evidencing the shipment were to be delivered to Birla Bros. upon the payment of a sight draft and the acceptance of the 180 day draft. I knew also from what they said that if the documents passed from the possession of our correspondent to Birla Bros. upon the payment of the sight draft and the acceptance of the 180 day draft that the latter draft was converted into what is known as clean paper, having no security under it at all except the signatures of the drawer and drawee. We had already received a report on Birla Bros. which was entirely unsatisfactory. On November 29, I wrote the letter, Plaintiff's Exhibit 36, setting forth the exchange of cables, advising that the two sight drafts drawn on Birla Bros., numbered 103004 and 103006A, respectively, had been paid. [304]

At no time did I write any letter to the Richfield Oil Company nor do I know of any letter being sent

(Testimony of Emil Leuenberger.)

to the Richfield Oil Company in which these transactions are referred to or stated to be a revolving or continuing transaction. I did not see Mr. Hall when he came to San Francisco about May 11, 1931.

Redirect Examination.

The letter marked Plaintiff's Exhibit 30, and the letter marked Plaintiff's Exhibit 31, written by me with respect to an acceptance for $10,000 issued against the draft on La Paz, was turned over to me by the acceptance clerk. Thereafter the entry was made by him on Plaintiff's Exhibit 122, "Supported by B/C 46843". That is the bank's number of the draft.

Recross Examination.

After dictating the letter, I told the acceptance clerk to see that the proceeds would be turned over to him for this particular purpose. At the time I dictated the letter, I assumed that it stated exactly what I wanted it to state. I dictated the letter of my own initiative and voluntarily. I turned the letter over to the acceptance clerk for the purpose of enabling him to read its contents with respect to the entry or entries that he was to make.

FREDERICK J. HELLMAN

was then called as a witness for defendant and testified as follows: [305]

Direct Examination.

I am Vice President in charge of the Foreign Department of Wells Fargo Bank & Union Trust Co. I have held that position for about three years, and this includes the fall of 1930, and the spring of 1931. I am familiar with the various methods of handling foreign collection business of depositors and customers and with the method of handling acceptance agreements and acceptance credit arrangements.

Some time in August. Mr. Gilstrap came to my office and informed me that Mr. Hall of Richfield was there, and that he was interested in an acceptance credit. I had a conversation with Mr. Hall at that time. To the best of my recollection I told Mr. Hall that I thought that we, meaning the Wells Fargo Bank, would be willing to go into such a transaction advancing them on their collections, and that I could see nothing that would stop us from doing it, but as long as they had other lines in the bank I would rather consult with Mr. Lipman first.

All that I discussed with Mr. Hall was the acceptance credit. I do not believe any amount was mentioned.

Mr. Hall and I then went downstairs to see Mr. Lipman. Up to this time Mr. Hall did not make any statement to me or to Mr. Gilstrap in my presence

(Testimony of Frederick J. Hellman.)

or to anybody else in my presence that the foreign business of the Richfield Oil Company was to be kept separate and apart from any other business of Richfield Oil Company with our bank. He did not make any statement in my presence to me or to Mr. Gilstrap or to any other person that he had an interest in the Foreign Department business of the Richfield Oil Company or that he was a partner in Richfield Oil Company's Foreign Department.

The purpose of the visit to Mr. Lipman was to have him [306] pass on the credit. We went into Mr. Lipman's office and I said to Mr. Lipman that Mr. Hall was representing the Richfield Oil Company; that he was the Manager of their export department, and that they had not been very well satisfied down in Los Angeles, and that he had been discussing advancing funds on their collections in the form of an acceptance arrangement.

I did not leave the office at any time while Mr. Hall and Mr. Lipman were discussing the matter. I remained throughout the entire conference and brought Mr. Hall upstairs afterwards. I think Mr. Hall was mistaken in stating that I left him alone with Mr. Lipman.

Mr. Hall told Mr. Lipman that they had a very good bunch of foreign customers and that all their collections or practically all their collections were paid without any trouble. Mr. Lipman said he thought it would be all right to open an acceptance credit but he wanted it understood that before we

(Testimony of Frederick J. Hellman.)

made any advance on their collections we would be able to check up through our foreign correspondence on their foreign customers. Mr. Hall said, "We have no objections, they are all right", or words to that effect. Mr. Lipman said to Mr. Hall, "Well it would be to your advantage to know what our banks think of your customers, it would be a help to the Richfield Oil Company".

Then the question came up of the amount of credit. I believe Mr. Lipman said to Mr. Hall, "We will advance you $150,000, $200,000, $250,000, on your foreign collections". He said to Mr. Hall that this credit was to remain in force until it was cancelled by either side; that we did not know whether it would work out or not; we did not know what kind of foreign collections they were handling, and if it did not work out we reserved the right to cancel the credit. As I remember it, we then stood up and we were going out [307] the door and Mr. Hall said to Mr. Lipman, "Mr. Lipman, I want it understood"—no, not that; he said, "You must realize that I am not in the financial end of the business; that I am only the Manager of the Foreign Department, and I will have to get the consent of my superiors to get this credit through". He further said that he knew we were giving them a line of credit of $625,000, and that if this acceptance credit was going to interfere with the loan line downstairs, he knew that they would not consent to it, and he wanted the acceptance credits separate from the loan downstairs.

(Testimony of Frederick J. Hellman.)

Mr. Lipman said to Mr. Hall, "I have no doubt that the loan downstairs is all right, Mr. Hall, this will be in addition to the $625,000." I am quite positive that the words "line of credit" were used. I don't think the conference with Mr. Lipman lasted more than five minutes.

During the conversation with Mr. Lipman I don't believe Mr. Hall stated at any time that he had an interest or participation of any kind with the Foreign Department of Richfield Oil Company.

Then we went upstairs and saw Mr. Gilstrap. On the way upstairs I decided that $150,000 was sufficient to start the credit off with, and so I took Mr. Hall back to Mr. Gilstrap and said it was all right; that we were going to start in for $150,000. Nothing else was said or done by Mr. Hall or Mr. Gilstrap or myself while I was present.

During the conversation with Mr. Lipman, the only reference that Mr. Hall made with my firmness was that it was to be in addition to the loan line downstairs; otherwise he did not think his people down in Los Angeles would make the credit. That was made immediately subsequent to his statement that he did not have authority to commit Richfield. [308]

The next time I saw Mr. Hall was in May, 1931, after the bank had told Mr. Hall that it was going to take over the proceeds of the drafts which are the subject of this litigation. About the 11th of May, Mr. Gilstrap called me out of my office informing

(Testimony of Frederick J. Hellman.)

me that Mr. Hall had come up to try to get us to change our opinion or change our course of action as to what we had done on the collections. I had a conference with Mr. Hall. Mr. Hall was quite eloquent in pleading with us to return the money. I remember more or less the words he used, which were, "You don't know what you fellows are doing to me holding out this money". He then told me that he had an interest in these transactions and that we were actually taking the money away from him; that the Richfield Oil Company was indebted to him for approximately $400,000, and that he felt very badly about the whole thing.

That was the first time that I had heard from any person whatever that Mr. Hall claimed to have an interest in the transaction.

As I remember it, on that occasion Mr. Hall did not make any statement to the effect that we agreed to keep this separate and apart.

I saw Defendant's Exhibit "B", being a telegram from the Netherlands Trading Society, on the 6th of October, 1930. I had a conversation with Mr. Gilstrap with reference to the contents of that telegram. I think this was during the visit of Mr. Hall because mention was made that they were very anxious to get as much on the shipment as possible. I did not participate in the conference with Mr. Hall and Mr. Pope on the 6th of October. I did not see Mr. Hall on the 8th of October, when he came back with the shipping documents and the

(Testimony of Frederick J. Hellman.)

drafts and the letter from the comptroller.

There was some discussion had between the officials of the [309] bank at about the time of the appointment of the receiver with respect to the collateral on deposit with the Foreign Department. I had a general discussion with Mr. Eisenbach and Mr. Motherwell on the same day as the appointment of the receiver. The telegram on January 16th was written after I had informed them about the transactions in the Foreign Department.

The bank from time to time returned to the Richfield Oil Company free of bankers lien or offset certain of the proceeds of various drafts that were collected from time to time. At the end of February, 1931, I recall a conference about the time that the $7700 was kept out from Richfield. With respect to Plaintiff's Exhibit 107, I had a consultation with Mr. Gilstrap before sending that letter, which was written under my direction. I am aware that the bank received a letter from Mr. McDuffie about this time, dated March 3, 1931, which is Plaintiff's Exhibit 106. Subsequent to the receipt of that letter I had a conference with officials of the bank with respect to handing back this particular lot of proceeds. At that time the City Service Company had just recently made an offer for 500,000 shares of Richfield common stock at $4.00 a share, and was very much interested in the purchase of the company, and it was decided between Mr. Lipman and myself that the money would be returned. Prior to

(Testimony of Frederick J. Hellman.)

transmitting the proceeds back to the Richfield Oil Company, as stated in the letter which is Plaintiff's Exhibit 108, there was a conference held between me and Mr. Lipman with reference to the subject matter of the letter which was subsequently written, and at that time there were facts known to me and to Mr. Lipman to the effect that the receivership of the Richfield Oil Company was in fair probability of being able to work itself out. The proceeds referred to in Plaintiff's Exhibit 108—$7749.55, were returned to the receiver. That letter was written under my instructions after my [310] conference with Mr. Lipman. There was also returned to the receiver the proceeds of the draft for $11,081.52 referred to in the letter.

Cross Examination

During office hours my time is filled up attending to matters connected with the bank and particularly in connection with the Foreign Department, but with no details. I was responsible to the bank for the proper, adequate and efficient management and control of the Foreign Department. As the control over the Foreign Department has been mine, my entire business hours are extensively occupied by giving my attention to matters in that Department. During every day I come in contact with a number of individuals calling at the Foreign Department. From time to time subordinates under me confer and consult with me respecting matters as-

(Testimony of Frederick J. Hellman.)

signed to them. I am not consulted in routine matters. During the period of three years that I have been in the Foreign Department, I have seen a great many hundreds of people doing business with that Department and I have been consulted on a vast number of occasions by my subordinates respecting matters in which they seek my advice and judgment. I am not in a position to determine with any degree of certainty any one of those transactions in which I have participated during the last three years, either with the depositor or patron of the bank or with the subordinates of my Department. It is not quite correct that this particular transaction was given no more attention by me than any other transactions of like character because every time we start a new credit it takes a great deal of thought and work.

I knew before the month of October, 1930, that the Richfield Oil Company was obligated to the Wells Fargo Bank to the extent of $625,000, and that at least before the 6th of October, 1930, [311] this represented an unsecured obligation. In August we had just given Richfield $125,000, so we thought they were in pretty good financial condition. I knew in a general way that Richfield Oil Company was obligated in some considerable sum not only to our bank but likewise to other banks throughout the country.

I have a memorandum made on the date of meeting with Mr. Hall and Mr. Lipman, from which I

(Testimony of Frederick J. Hellman.)

refreshed my recollection. I dictated that memorandum right after the meeting. The first time after the dictation of the memorandum that I next saw it was a few weeks ago when we went through our files in looking up this case. I did not have this particular conversation called to my attention from the date on which it occurred until approximately a few weeks ago when this case was about to be prepared for trial. I do not know who the last person was who was in my office immediately prior to the time that I talked to Mr. Hall. I have no recollection of any conference participated in by me on that day with any patron of the bank or any employee of the bank other than this particular one with Mr. Hall. I cannot give you the name of any individual with whom I came in contact that day outside of the employees of the bank or the substance of any conference I had with any individual on that day.

I listened to the testimony of Mr. Gilstrap and Mr. Leuenberger, and have been in consultation with them during the progress of this trial and in anticipation of the trial for the purpose of endeavoring to rebuild or recall things to my memory. I have examined all the correspondence in this case and have read it over very carefully. The only correspondence with which I personally came in contact during the history of this transaction did not total more than a half dozen communications, including wires.

(Testimony of Frederick J. Hellman.)

During the course of my conversation with Mr. Hall, I did not undertake to explain to him the contents of the printed form of the acceptance agreement. I did not tell Mr. Hall that if the form of acceptance agreement was signed by the Richfield Oil Company that [312] the original security that was put up upon the acceptance agreements would likewise stand as security for the $625,000 indebtedness which at that time was unsecured. So far as I know no other official of the bank had explained that situation to Mr. Hall. We never explain that. There is no memorandum of any kind in existence by which I can refresh my recollection as to what occurred between myself, Mr. Hall and Mr. Gilstrap prior to the time that I took Mr. Hall to Mr. Lipman's office.

During the conversation with Mr. Hall and Mr. Lipman, Mr. Hall said that he did not want the acceptances to interfere with the loan line downstairs. By "downstairs", I mean the Note Department. The note desk is downstairs and the Foreign Department is on the fifth floor. Mr. Hall said that he wanted these acceptance transactions to be considered separate from the loan line. He did use the word "separate". They had a loan of $625,000. If they repaid $100,000, presumably they could have raised it back again to $625,000. Mr. Hall did not say that he wanted it understood that the acceptance arrangement would be separate and apart from the indebtedness downstairs. He used the

(Testimony of Frederick J. Hellman.)

word "separate", and he referred to the loan of $625,000. The essence of the statement is that he wanted it considered separate from the loan line of $625,000. At the time this conversation occurred, Mr. Hall told me that the Richfield Oil Company wanted to get as large a sum as possible on the acceptance line. At no time did Mr. Hall say to me or to Mr. Lipman that the Richfield Oil Company was in a position to make any payment upon the $625,000.

I knew that an additional loan had been made to Richfield in July. This was not to meet interest.

When Mr. Hall came to San Francisco in May, 1931, I do not remember his having stated that it had been understood that the collections placed by him in the bank should be kept separate and apart from other transactions. I heard Mr. Gilstrap testify to the effect that Mr. Hall had said that he had an interest in these transactions and that they were supposed to have been kept separate and [313] apart. He had already had a conversation with Mr. Gilstrap. I was called out because the answer of Mr. Gilstrap on the subject had been "no". I went out and talked to him and while I was there those statements were not made. Mr. Hall told Mr. Gilstrap in my presence that the bank in Los Angeles was discounting the foreign paper of Richfield Oil Company.

(Testimony of Frederick J. Hellman.)

I did not see Mr. Hall or Mr. Pope when they called in the office the morning of October 6th, so have no knowledge whatever as to what transpired between Mr. Pope and Mr. Gilstrap and Mr. Hall and Mr. Leuenberger.

Redirect Examination:

In February, 1931, when the question of the receivership came up, I had occasion to go over the records and files of the bank and discuss this matter in question. After Mr. Hall gave his deposition I read over that deposition and advised my attorneys as to the part I disagreed with, and at their request I started to refresh my recollection from the records that were available.

Recross Examination.

I read from day to day all the letters that are sent out by the Foreign Department. They are all examined by me after they have been sent. We keep a copy in the Mailing Department that comes down to me every morning. I do not read the correspondence coming into the department unless I find it necessary. From time to time I had read each of the letters eminating from the bank that has been introduced in evidence by the plaintiff in this case. I read the letters from the bank in which it was undertaken to describe the collection of the proceeds of the drafts and the application of those proceeds in anticipation of acceptances. I never at any time sent to the Richfield Oil Company any letter undertaking to qualify the contents of any of

(Testimony of Frederick J. Hellman.)
the letters which we have introduced in evidence. In connection with the return of the proceeds amounting to $7700, referred to in the letter dated February 28, 1931, I read all of the [314] correspondence that passed between the Richfield Oil Company and the receiver and the bank.

I was familiar at least within a day after each of the letters of the Foreign Department was written by the bank, with each of the letters which has been introduced in evidence.

FREDERICK L. LIPMAN

was then called as a witness for defendant, and testified as follows:

Direct Examination

I have been engaged in the banking business something over 49 years. I have been connected with the Wells Fargo Bank & Union Trust Co., its predecessor, the Wells Fargo Nevada National Bank, and its predecessor, the Wells Fargo & Co., the whole period of 49 years. My present position with the Wells Fargo Bank & Union Trust Co. is president. I have held that position since 1920. I was president in the fall of 1930, and in the winter and spring of 1931.

I received a visit from a representative of the Foreign Department of the Richfield Oil Company in the month of August, 1930. This representative, Mr. Hall, stated that there had been some prior

(Testimony of Frederick L. Lipman.)

discussion as to this line of business, and I think I said something to the effect that if these drafts were good security, that is, if they were drawn on people we had confidence in, we could regard those as collateral for an acceptance credit. This representative assured me that the drafts were quite all right. I cannot make a credit for the bank without putting a figure on it. I suggested that the credit might be $150,000 or $250,000. We could not lay much stress between one sum or another because it was to be governed by these drafts. That appeared to be quite acceptable to this representative. [315]

I do not recollect that anything was said by Mr. Hall to me on that occasion that he was a partner of Richfield or had any participation with the Richfield Oil Company in the business of the Foreign Department of that company. Had such a thing been said, I certainly would have remembered it because we would not be dealing with the principal then if we were dealing with a mixed interest.

It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the Foreign Department and not the general treasury relations of the company, and he did not want the two mixed up; he wanted them kept separately. No discussion was had at that conference with respect to a bankers lien.

Subsequent to the appointment of the receiver, we tried to keep in touch with the affairs of the

(Testimony of Frederick L. Lipman.)

Richfield Oil Company in the hands of its receiver, and reports were made to me from time to time with respect to the affairs of Richfield.

The answer to the question as to whether on numerous occasions from and after the appointment of the receiver, the question of the Wells Fargo Bank's right, if it had any, to exercise a bankers lien against the proceeds of the drafts in the Foreign Department, is "no", because we never had any discussion as to our rights; we discussed procedure. The question asked me was, did we ever discuss our rights; the answer to that is "no".

At or about the time of the correspondence marked Plaintiff's Exhibits 106, 107 and 108, with reference to the return by the bank of the moneys which were then in its hands on collections from the Foreign Department, I recall discussions taking place with respect thereto. At that time I and other executives of the bank were in touch, or thought we were in touch with the financial con- [316] dition of the Richfield Oil Company.

JULIAN EISENBACH

was then called as a witness for defendant and testified as follows:

Direct Examination:

I am vice president of the Wells Fargo Bank & Union Trust Co. in charge of the Credit Depart-

(Testimony of Julian Eisenbach.)

ment. I have been connected with the Wells Fargo Bank & Union Trust Co. for 34 years. I have been vice president for 16 years. I am generally familiar with the affairs of the Richfield Oil Company and the loans of the Wells Fargo Bank to it prior to the receivership of that company. Since the receivership, I have endeavored to keep in touch with the affairs of the receivership, and I have from time to time conferred with Mr. McDuffie.

Mr. McDuffie has called upon the Wells Fargo Bank upon two or three occasions since his appointment as receiver, and has discussed with me and other officials of the bank the method of endeavoring to work out the affairs of the receivership.

In the latter part of September or the early part of October, 1930, I had some conversation with Mr. McKee, vice president and comptroller of the Richfield Oil Company, regarding some foreign credits. This conversation was in his office in the Richfield Building in Los Angeles. He brought up the question of foreign credit, and mentioned a large amount. That was some work that I had not been accustomed to handling. He mentioned some large amount in connection with a firm in Calcutta. I knew little or nothing about the thing, but in my position as head of the Credit Department I thought it was incumbent upon me to get some information as to the standing of that company. I went outside and telephoned [317] Mr. Leuenberger and asked him to check up this particular firm in Calcutta,

(Testimony of Julian Eisenbach.)

India. The name of the firm was Birla Bros. My conference with Mr. McKee took place prior to the receipt on October 6th of Defendant's Exhibit "F", the cablegram from Calcutta, India.

I am not connected with the Foreign Department of the Wells Fargo Bank and do not arrange for credits in the Foreign Department, so I did not have any negotiations with Mr. Hall or with any other representative of the Richfield Oil Company except this conversation with Mr. McKee prior to the establishment of the acceptance credit.

On the 15th day of January, I received information that the affairs of the Richfield Oil Company were about to be put in the hands of a receiver. I received the telegram from William C. McDuffie, as receiver, addressed to Wells Fargo Bank & Union Trust Co. under date of January 16, 1931, being Plaintiff's Exhibit 2.

I am acquainted with Mr. Nolan, formerly the head official of the Bank of America at Los Angeles. I do not recall any conversation had by me with Mr. Nolan on the 16th day of January with reference to some meeting of bankers that took place in Los Angeles. I am not prepared to state definitely that that conversation did not take place.

After the receipt of the telegram marked Plaintiff's Exhibit 2, we sent them a telegram. Prior to sending that telegram, the Wells Fargo Bank had not been doing anything with reference to a bank deposit standing in the name of Richfield Oil Com-

(Testimony of Julian Eisenbach.)

pany. Subsequent to the sending of that telegram we waited for an answer to come from Mr. McDuffie before doing anything in the matter. Prior to the time that this telegram was sent, I had information as to the existence of drafts and foreign collections in the Foreign Department, and prior to sending the telegram I communicated with Frederick Hellman, who was in charge of the Foreign Department, [318] and also with Mr. Motherwell, the vice president.

To the best of my recollection, I wrote that telegram at Mr. Motherwell's desk and conferred with him about it. Then I sent it up to him. He sent word out that it agreed with his conclusions and to send it out.

I received the telegram marked Plaintiff's Exhibit 13. I sent the telegram marked Plaintiff's Exhibit 14. The sum mentioned therein was transferred to the credit of the receiver of the Richfield Oil Company as stated in the the telegram.

On May 11, 1931, a telephone conversation took place between me and Mr. McDuffie. Mr. McDuffie rang me up and said, "I have just received notice that the bank has applied $145,000 on its lien, I am aware that you have reserved that right by your telegram of January 16th, and now you have exercised the lien, I don't think it is playing cricket". That is about all that Mr. McDuffie said. I told him that I was not aware of the fact as I had been in Los Angeles. I told him I would look into it

(Testimony of Julian Eisenbach.)

and ring him back. I am absolutely positive that Mr. McDuffie did not say that he considered it an absolute violation of the agreement that had been entered into between the banks or that he considered it a violation of his own agreement as represented by his telegram.

I met Mr. Hall shortly after the time that I had the conversation with Mr. McDuffie. To the best of my recollection Frederick Hellman brought him down to my desk. He wanted us to reverse our decision respecting our bankers lien. I told him that was a step that had been taken by Mr. Motherwell, another officer of the bank, and that he would have to see him. I took him downstairs immediately to see Mr. Motherwell, and he made a similar plea to him. The ultimate decision was "no".

As part of my duties I attempted to remain familiar with [319] the affairs of the Richfield Oil Company during the months of January, February, March, April and May, 1931, and I was aware of the ups and downs that took place during those months. I reported those ups and downs to Mr. Motherwell and Mr. Lipman. In the month of February, 1931, the condition was more up than down. In May, 1931, a very grave situation faced the Richfield Oil Company. I thought that bankruptcy was imminent.

Cross Examination.

I keep notes of the telephonic conversations occurring between me and other parties if it is im-

(Testimony of Julian Eisenbach.)

portant enough. I take them down in shorthand. I have been able to write shorthand ever since I left grammar school, about 38 years ago. It has been my practice all along in my notes and memoranda of important conversations to write them in shorthand.

I have been more or less familiar with the affairs of the Richfield Oil Company for some period of time prior to the date upon which Mr. McDuffie was appointed receiver of the Richfield Oil Company. This period would include three or four years. I made trips to Los Angeles prior to January 15, 1931, on the average of three or four times a year, and on these occasions had spent some time in investigating the financial affairs of Richfield. Shortly prior to the 15th day of January, 1931, I spent several days making an investigation with respect to the affairs of Richfield. During my examination into the affairs of Richfield I learned that it was obligated to a number of banks throughout the United States in a substantial amount of money —in an amount of approximately $10,000,000. I knew generally the financial situation of Richfield Oil Company prior to the month of October, 1931.

Prior to coming to the courtroom I had upon occasions conferred with officials of the bank for the purpose of refreshing [320] my recollection concerning the matters testified to here. I examined the correspondence that we had with Mr. McDuffie with respect to transferring the balance in the checking account and our bankers lien.

(Testimony of Julian Eisenbach.)

On or about the 7th day of May, 1931, I was in Los Angeles. My telephone conversation with Mr. McDuffie was four or five days after May 8, 1931. I think I was in Los Angeles on May 8, 1931. I had returned to San Francisco approximately two or three days before this telephonic conversation. Between the date of my return to San Francisco and the date upon which this conversation occurred, I had not heard anything at all about the bank offsetting any of the cash balance in its possession against the indebtedness due from the Richfield Oil Company. A few days prior to May 8, 1931, I had a conversation with Mr. McDuffie in Los Angeles. Between the date of that conversation and the date of the telephonic conversation between me and Mr. McDuffie, I had not communicated by letter or telephone or telegram with the bank, but I rendered a report when I returned to San Francisco. This report was in writing.

My telephonic conversation with Mr. McDuffie occurred several days after the 8th day of May, 1931. There is a way by which I can refresh my recollection so as to be able to tell the date on which that conversation occurred.

(Here the record shows that counsel for defendant handed to counsel for plaintiff a memorandum dated May 11, 1931.)

Until Mr. McDuffie gave me the information I had no knowledge that the bank had attempted to

(Testimony of Julian Eisenbach.)

exercise its bankers lien upon these particular collections.

Between the 15th of January, 1931, and my visit to Los Angeles during the early part of May, 1931, I made no inquiry of Mr. [321] McDuffie for the purpose of obtaining the financial condition of the Richfield Oil Company. I did not testify that anybody made a threat of bankruptcy. I said I thought bankruptcy was impending. Nobody had said that they were going to put them into bankruptcy. There was a danger of bankruptcy. I can name no individual who made any threat of putting them into bankruptcy. I knew that during the early part of February, 1931, the Richfield Oil Company had to meet its obligations to the State of California based upon its gasoline tax obligation, and that this was a very substantial obligation. There was a threat of danger back in January, 1931, but to a greater degree later on. I have not attempted to say that anybody told me that the Richfield Oil Company would be put into bankruptcy. My judgment told me that there was a danger of bankruptcy. The danger was not so acute in January and February of 1931. No petition to put the Richfield Oil Company into bankruptcy has ever been filed even down to the present time. I learned while I was in Los Angeles during the early part of May, 1931, that it was necessary for the Richfield Oil Company to pay taxes upon its property. I recall that among other things on or about the 15th or 16th of Jan-

(Testimony of Julian Eisenbach.)

uary, 1931, Mr. McDuffie sent to the bank a certified copy or at least a copy of the order appointing him receiver and that document came under my observation. I don't remember whether or not I read the order appointing him receiver.

We received the telegram marked Plaintiff's Exhibit 2. I read this telegram. After the receipt of this telegram I sent to the receiver the telegram dated January 16th, marked Plaintiff's Exhibit 3. Then a series of telegrams and correspondence passed between me and Mr. McDuffie.

To my knowledge Mr. McDuffie did not visit the bank during the period of time intervening between the 15th of January, 1931, and the 8th day of May, 1931.

I met Mr. Hall in San Francisco shortly after my return from Los Angeles. We participated in a brief conversation. I believe Mr. Gilstrap was present at the time of this conversation. I am [323] sure that during the course of this conversation Mr. Hall made no statement to me or to the other parties present that he had supposed that these particular funds were kept separate and apart from the general indebtedness due to the bank. I am certain that nothing of this kind occurred because it would have made a marked impression on me.

Redirect Examination:

My discussion with Mr. McDuffie on the occasion of my visit to him in Los Angeles prior to his telephone message of May 11, 1931, was on the

(Testimony of Julian Eisenbach.)

subject of the general standing of the company; a sort of progress report. There was no discussion as to the right of the Wells Fargo Bank to offset as against these foreign collections. During the period of time of the appointment of the receiver up to the month of May, 1931, the Richfield Oil Company had certain periods of financial stress and at one point the financial stress was met by borrowing money from the Cities Service Corporation and subsequently borrowing on receiver's certificates.

Recross Examination:

Aside from the telegrams relating to the question of set-off and restoration of funds, I had no communication from Mr. McDuffie from the date of his appointment and the date of my visit to Los Angeles.

Further Redirect Examination:

During this period of time I was in communication with Mr. Nolan and the other bankers investigating the affairs of the Richfield Oil Company. On the subject of the advance of moneys to the Richfield Oil Company, it is a fact that a representative of our attorneys went to Los Angeles and investigated it during the period in question.

R. B. MOTHERWELL

was then called as a witness for defendant and testified as follows: [323]

Direct Examination:

I am vice president of Wells Fargo Bank & Union Trust Co., and have held that position a little over five years. Prior to that time I was with the Federal Reserve Bank for a period of eight years. I have been in the banking world one way or another for the past fifteen or twenty years.

During the months of January, February, March, April and May of 1931, I participated in conferences in Wells Fargo Bank with respect to the affairs of Richfield Oil Company. During that period of time the condition of the receivership was under discussion many times. Mr. Eisenbach was delegated to the position of keeping in touch with the affairs of the Richfield Oil Company as they progressed from time to time during the receivership. He made reports from time to time to the executive officers of the bank and to me and to Mr. Lipman with respect to the affairs of the Richfield Oil Company and its receivership. During this period of time consideration was given in these conferences held in Wells Fargo Bank with respect to the bank's position with reference to a bankers lien or offset on the general indebtedness of the Richfield Oil Company to it. That was considered on more than one occasion. The fact that there were drafts collected and drafts in the process of collection by the Foreign Department of

(Testimony of R. B. Motherwell.)

Wells Fargo Bank was considered from time to time by me, Mr. Lipman, Mr. Hellman and other officials of the bank. I read Plaintiff's Exhibit 2 and discussed its contents with Mr. Eisenbach. Plaintiff's Exhibit 3 was considered by me and Mr. Eisenbach, and I am familiar with that document. Prior to the sending of the telegram there had been a discussion between me and Mr. Eisenbach, and I participated in the preparation of the telegram. We went over the telegram carefully. We had received information from Mr. Hellman with respect to the collections in the Foreign De- [324] partment then outstanding. He advised me that there were collections in the Foreign Department under process of collection under an arrangement with Richfield Oil Company.

As a banker, I have had experience with bankers liens and from time to time I have had the necessity of considering bankers liens. On the 16th of January, 1931, when I sent that telegram, I had a definite understanding as to bankers liens.

About May 11th or 12th, 1931, I met Mr. Hall. Mr. Eisenbach and Mr. Gilstrap brought him to my office. The tenor of the conversation with him was with respect to the restoration of the funds covered by certain collections to the receiver for the Richfield Oil Company.

Mr. Hall made absolutely no statement to me at that time that he had an interest in the collections in the Foreign Department of the Richfield Oil Company, nor did he say that there was an under-

(Testimony of R. B. Motherwell.)

standing with the Wells Fargo Bank that the matter was to be kept separate and apart.

Cross Examination:

I kept no memorandum of conversations occurring between me and Mr. Hall. Mr. Hall made no statement in my presence that he had supposed the collections had been kept separate and apart from the general indebtedness due to the bank. As vice president of Wells Fargo Bank & Union Trust Co. I am kept pretty busy during my office hours. I come in contact with many individuals, that is with many customers and patrons of the bank, as well as subordinates in the bank. My time is pretty well occupied in consulting with various customers and patrons of the bank and in attending to matters called to my attention by my subordinates in the bank. My time has been pretty well occupied in rendering that character of service from the date on which Mr. Hall's interview occurred down to the present time. [325] Until within the last few weeks my attention was not directed to the conversation occurring between myself and Mr. Hall in the month of May, 1931. I have talked about this matter with Mr. Gilstrap and Mr. Hellman for the purpose of refreshing my recollection so as to enable me to testify. Mr. Gilstrap did not tell me about his experience on the stand as a witness. I have talked very little about the case. I have looked at a few memoranda to refresh my memory and tried to get the dates.

(Testimony of R. B. Motherwell.)

At the time the telegram, Plaintiff's Exhibit 3, was prepared, I read over carefully the receiver's telegram to the bank dated January 16, 1931, and I was familiar with its contents at the time the telegram marked Plaintiff's Exhibit 3 was prepared.

Defendant then offered in evidence a letter dated March 14, 1931, from Wells Fargo Bank & Union Trust Co. to Heller, Ehrman, White & McAuliffe, and said letter was received in evidence and marked Defendant's Exhibit "M". Said letter requested Heller, Ehrman, White & McAuliffe to prepare a claim for the bank against the receiver of Richfield Oil Company, giving the name of the receiver, his address, and the date by which the claim should be filed.

Defendant then offered in evidence a letter from Heller, Ehrman, White & McAuliffe to Wells Fargo Bank & Union Trust Co. dated March 27, 1931. Said letter was received in evidence and marked Defendant's Exhibit "N". Said letter stated that the claim against the Richfield Oil Company had been prepared and was enclosed for the signature by the proper officer.

Defendant then offered in evidence a letter dated March 27, 1931, from Heller, Ehrman, White & McAuliffe to Wells Fargo Bank & Union Trust Co., and said letter was received in evidence and marked Defendant's Exhibit "O". Said letter stated that the claim of the bank against the Richfield Oil Company for services rendered by the

[326] bank as registrar was enclosed and requested that it be signed by the proper officer.

Defendant then offered in evidence a document entitled "Stipulation" with the title of the Court and cause of the action in which the receiver of Richfield Oil Company was appointed, and said document was received in evidence and marked Defendant's Exhibit "P". Said document was a stipulation between William C. McDuffie, receiver, and Wells Fargo Bank & Union Trust Co., by which it was stipulated that the petition of Wells Fargo Bank & Union Trust Co. for an Order directing (Testimony of R. B. Motherwell.)
the receiver to accept an amendment to its proof of claim might be filed and that an Order be made authorizing the bank to file the amendment to proof of claim and instructing the receiver to receive the same for filing. It was further stipulated therein that the acceptance of proof of claim for filing would be without prejudice to the rejection thereof or the making of any objection to its contents and without prejudice to the rights of the receiver in the present action.

Defendant then offered in evidence an Order of the Court in the action by which the receiver was appointed by which it was ordered that defendant be authorized to file its amendment to proof of claim; that the receiver be instructed to receive and accept the same for filing, and that the same was without prejudice to the rights of the receiver in the same respects as hereinabove set forth with respect to the stipulation. Said document was re-

(Testimony of R. B. Motherwell.)
ceived in evidence and marked Defendant's Exhibit "Q".

Defendant then offered in evidence an amendment to proof of claim filed in the action by which the receiver of the Richfield Oil Company was appointed and said document was received in evidence and marked Defendant's Exhibit "R". Said document stated that at the time of the preparation of the original claim against the [327] receiver for the general indebtedness of Richfield Oil Company to Wells Fargo Bank & Union Trust Co. the information for said claim had been compiled and delivered by the Note Department of the Wells Fargo Bank & Union Trust Co., which was a separate department from the Foreign Department; that said Note Department had no records in its department of collateral or other security deposited with the Foreign Department, or any other department; that through inadvertence and lack of knowledge by the Note Department said original claim stated that there were no offsets or counterclaims to the debt set forth in said claim and that no securities were held by the claimant for said indebtedness, whereas the facts were that unknown to the Note Department the drafts and the proceeds thereof involved in the present action were held in the Foreign Department as security for all of said indebtedness, and that pursuant to the terms of the acceptance agreements introduced in evidence in the present case these drafts were held as security for all liability of Richfield Oil Company to Wells Fargo Bank, and that pursuant likewise

to the laws of the State of California with respect to bankers' liens, claimant asserted a lien upon said drafts and upon all the proceeds thereof. Said claim further set forth the telegrams of the 16th of January, 1931, marked Plaintiff's Exhibits 2 and 3, and stated that by virtue of said telegrams the lien against these drafts and the proceeds thereof had been reserved.

Defendant rested.

Counsel for complainant then moved the Court for a Judgment in favor of complainant in the sum of $144,758.79 principal, being the principal sum upon the drafts in litigation heretofore collected by defendant and then in its possession, together with interest on that sum at the legal rate from the date on which said moneys came [328] into the possession of defendant to the date of Judgment.

It was then stipulated that the Amended Bill of Complaint be considered amended so as to pray for a money judgment.

Counsel for defendant thereupon moved the Court to strike the testimony of Mr. Nolan and Mr. McDuffie in so far as the same relates in any manner whatsoever to a conference or purported conference held at Los Angeles at, about or subsequent to the appointment of the receiver, between Mr. McDuffie and the various bankers, said motion being made upon the ground that the defendant Wells Fargo Bank & Union Trust Co. was not present or represented at that conference; that

what took place was out of the presence of the defendant and is not binding in any way upon it. Furthermore, that this testimony as to what was said and done at that conference is hearsay with respect to defendant and is not binding upon it. Counsel for defendant further moved the Court to strike from the record all testimony given upon direct examination or otherwise by Mr. Hall and Mr. Pope with respect to any agreement or purported agreement between Richfield Oil Company and Wells Fargo Bank & Union Trust Co., or between Mr. Hall and Wells Fargo Bank & Union Trust Co., that there be kept separate and apart the transactions of the Foreign Department of Richfield Oil Company with the Foreign Department of Wells Fargo Bank & Union Trust Co. from other general transactions of Richfield Oil Company with the bank, said motion being made on the ground that testimony with respect to said agreement or purported agreement is an attempt by parol evidence to change the terms of a written agreement, which agreement had been introduced by complainant in evidence and which binds the complainant and no evidence can be introduced to change by parol the terms of that agreement, said agreement referred to being "Acceptance Agreement", Plaintiff's Exhibit 16. [329]

Counsel for defendant then further moved the Court that Judgment for the defendant be entered, that complainant take nothing by his complaint, and that defendant be hence dismissed with costs of suit and for such further relief as the Court may grant, quieting the title of this defendant to

the proceeds of the drafts, the subject matter of this litigation.

Counsel for defendant further moved the Court for Special Findings of Fact and Conclusions of Law, as per request theretofore served on counsel for complainant and filed in writing with the Court, as follows:

> "Comes now WELLS FARGO BANK & UNION TRUST CO., the defendant in the above entitled action and hereby requests the Court, that, in rendering and making its Judgment in the above entitled action, said Court make specific Findings of Fact and Conclusions of Law upon the following issues included in said action as follows:
>
> FINDINGS OF FACT
>
> 1. The drafts, the proceeds of which are the subject of this action, were deposited by the Richfield Oil Company of California with defendant herein under and by virtue of a written contract designated 'Acceptance Agreement', dated October 4, 1930, executed by said Richfield Oil Company of California, and under and by virtue of the supplemental acceptance agreement dated November 28th, 1930, each of which said agreements provides that any and all documents of title, money and goods held by said Wells Fargo Bank & Union Trust Co. as security for any acceptance of said Richfield Oil Company of California, shall also be held by said Wells Fargo Bank & Union Trust Co. as security for any other

liability from said Richfield Oil Company of California to said Wells Fargo Bank & Union Trust Co. whether existing at the time of the execution of said agreements or thereafter contracted.

2. There was only one agreement with respect to said drafts or any thereof and the proceeds thereof existing between defendant Wells Fargo Bank & Union Trust Co. and said Richfield Oil Company of California, and said agreement consisted of the aforesaid acceptance agreement dated October 4, 1930 as supplemented by the acceptance agreement dated November 28, 1930. All drafts for presentation or collection in foreign countries deposited by said Richfield Oil Company of California with defendant from the seventh day of October, 1930 up to January 15, 1931, the date of the appointment of the plaintiff as receiver herein, were deposited pursuant to said agreement, and in this respect the Court finds that there was no agreement entered into between said Richfield Oil Company of California and defendant that any of said drafts were to be deposited solely for the purpose of collection or otherwise than under said agreement and pursuant to the terms, conditions and covenants thereof. [330]

3. The drafts and proceeds which form the subject of this action are and at all times since the appointment of the receiver of said Richfield Oil Company of California have been sub-

ject to defendant's right of set off or bankers' lien for the past due indebtedness of said Richfield Oil Company of California to defendant in the sum of $625,000.00 and interest.

4. No agreement was entered into at, prior or subsequent to the deposit of said drafts, the proceeds of which form the subject of this action, wherein and whereby defendant agreed to waive its right of set off or bankers' lien or in which the defendant agreed not to apply said drafts or the proceeds thereof against said indebtedness of said Richfield Oil Company of California to defendant in the sum of $625,000.00 and interest.

5. Defendant did not by any agreement, writing, statement, act or deed at, prior or subsequent to the deposit of said drafts or any thereof by said Richfield Oil Company of California waive its right of set off or bankers' lien or waive its right to apply said drafts or the proceeds thereof as against said indebtedness of said Richfield Oil Company of California to defendant in the sum of $625,000.00 and interest.

6. That no agreement was entered into at, prior or subsequent to the appointment of the plaintiff as receiver of said Richfield Oil Company of California wherein or whereby defendant Wells Fargo Bank & Union Trust Co. agreed to waive its right of set off or bankers' lien or in which said defendant agreed not to apply said drafts or the proceeds thereof as

against said indebtedness of said Richfield Oil Company of California to defendant in the sum of $625,000.00 and interest.

7. Defendant Wells Fargo Bank & Union Trust Co. did not by any agreement, writing, statement, act or deed at, prior or subsequent to the appointment of plaintiff as receiver of said Richfield Oil Company of California waive its right of set off or bankers' lien or its right to apply the said drafts or the proceeds thereof as against said indebtedness of said Richfield Oil Company of California to said defendant in the sum of $625,000.00 and interest.

8. Defendant Wells Fargo Bank & Union Trust Co. is not estopped by any agreement, writing, statement, act or deed to exercise its right of set off or bankers' lien or its right to apply the said drafts or the proceeds thereof as against said indebtedness of said Richfield Oil Company of California to defendant in the sum of $625,000.00 and interest.

9. Neither the plaintiff nor any other persons herein in any way involved were at any time directly or indirectly damaged or injured by any agreement, writing, statement, act or deed of defendant Wells Fargo Bank & Union Trust Co. with respect to the drafts and/or proceeds thereof subject of this litigation. [331]

CONCLUSIONS OF LAW

1. Under and by virtue of the said "Acceptance Agreement" dated October 4, 1930, ex-

ecuted by said Richfield Oil Company of California, and as supplemented by said acceptance agreement dated November 28, 1930, defendant is entitled to apply the proceeds of all the aforementioned drafts to the satisfaction of the said indebtedness of Richfield Oil Company of California to defendant Wells Fargo Bank & Union Trust Co. in the sum of $625,000.00 and interest.

2. Defendant Wells Fargo Bank & Union Trust Co. is entitled to apply the proceeds of all of said drafts to the satisfaction of said indebtedness of Richfield Oil Company of California to it under the provisions of law giving to said defendant a bankers' lien or right of set off.

3. Defendant Wells Fargo Bank & Union Trust Co. has not at any time by agreement, writing, statement, act or deed waived its right of set off or bankers' lien or its right to apply said drafts or the proceeds thereof to the satisfaction of said indebtedness of said Richfield Oil Company of California to it.

4. Defendant Wells Fargo Bank & Union Trust Co. is not estopped to apply said drafts or the proceeds thereof to the satisfaction of said indebtedness of said Richfield Oil Company of California to it.

5. Plaintiff, receiver herein, is not entitled to recover from defendant Wells Fargo Bank & Union Trust Co. in any sum whatsoever by reason of his complaint on file herein, and is

not entitled to any of the relief sought by him herein and this defendant Wells Fargo Bank & Union Trust Co. is entitled to be hence dismissed in this action with its costs of suit herein incurred.

Dated: San Francisco, California, this 16th day of July, 1932."

The cause was then ordered to be submitted upon the filing of briefs by the parties.

The above and foregoing is all the material evidence introduced at the trial of said cause and all proceedings had in the trial thereof.

WHEREFORE Wells Fargo Bank & Union Trust Co., defendant and appellant, prays that the above statement of evidence be settled, approved and allowed by the above entitled Court as a true, full and [332] correct and complete statement of all the evidence taken and given on the trial of said cause for use on the appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: this 13th day of November, 1933.

HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for Appellant.

Service of the foregoing Engrossed Statement of Evidence and receipt of a copy thereof this 14th day of November, 1933, is hereby admitted and acknowledged.

SULLIVAN, ROCHE, JOHNSON & BARRY
GREGORY, HUNT & MELVIN,
Attorneys for Complainant and Appellee.

IT IS HEREBY STIPULATED that the foregoing Statement of Evidence is true and correct and is agreed to as a correct statement under Paragraph B of Equity Rule 75 and the lodgment thereof in the Clerk's office for the examination of the plaintiff and notice of such lodgment and the time when the same will be presented to the Judge for approval, are hereby waived, and the same may be approved by the Judge at once without notice.

HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for defendant and appellant.

SULLIVAN, ROCHE, JOHNSON & BARRY
GREGORY, HUNT & MELVIN,
Attorneys for plaintiff and appellee.

The foregoing statement of evidence is in all respects hereby approved and settled as a true and complete statement of the evidence adduced on the trial of the above entitled action.

Dated: this 16th day of November, 1933.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed Nov. 16, 1933. [334]

(Title of Court and Cause.)

PETITION FOR APPEAL.

To the HONORABLE, FRANK H. NORCROSS, Judge of the United States District Court for the Northern District of California, Southern Division:

The petition of WELLS FARGO BANK & UNION TRUST CO., a [335] corporation, complainant herein, respectfully represents:

That your petitioner, the above named defendant, conceiving itself aggrieved by the decree made and entered on the 13th day of May, 1933, in the above entitled matter in the above entitled Court, does hereby appeal from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith.

WHEREFORE your petitioner prays that this appeal be allowed and that the amount of the cost bond be fixed and that said appeal be made returnable to the United States Circuit Court of Appeals for the Ninth Circuit according to law; and that a duly authenticated transcript of the records, proceedings and papers and exhibits upon which said Decree was made be filed with the Circuit Court of Appeals for the Ninth Circuit.

Dated: this 10th day of August, 1933.

HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for petitioner and appellant.

Service of a copy of the foregoing Petition for Appeal is hereby acknowledged this 10th day of August, 1933.

GREGORY, HUNT & MELVIN
SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for complaint and appellee.

[Endorsed]: Filed Aug. 10, 1933. [336]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Now comes WELLS FARGO BANK & UNION TRUST CO., a corporation, defendant and appellant in the above entitled cause, and respectfully states that there are errors in the records, proceedings and decree in said cause in the District Court for the Northern District of California, Southern Division, and files the following Assignment of Errors upon which it will rely in the prosecution of the appeal here- [337] with petitioned for in said cause from the decree of said Court made and entered on the 13th day of May, 1933:

I.

The District Court for the Northern District of California, Southern Division, erred in granting a decree ordering the payment to complainant by defendant of the sum of $163,305.85, for the reason that it appears from the record in this case that defendant is entitled to retain said sum and that

complainant is not entitled to the same or any part thereof.

II.

Said Court erred in holding and deciding that the drafts, the proceeds of which are the subject of this action, were not deposited by Richfield Oil Company of California with defendant herein under and pursuant to the contract designated "Acceptance Agreement", dated October 4, 1930, executed by said Richfield Oil Company of California, or under and by virtue of the supplemental acceptance agreement dated November 28, 1930, each of which said agreements provides that any and all documents of title, money and goods held by defendant as security for any acceptance of said Richfield Oil Company of California shall also be held by defendant as security for any other liability from said Richfield Oil Company of California to defendant whether existing at the time of the execution of said agreements or thereafter contracted.

(a) Said Court erred in holding and deciding that the bankers acceptances drawn by said Richfield Oil Company of California on defendant were secured only by foreign drafts of said Richfield Oil Company of California of an aggregate amount slightly in excess of the amount of acceptances so issued, and only by drafts having a maturity shorter than the maturity of said acceptances, the [338] proceeds of which could be and actually were received by defendant in San Francisco at least one

day before the maturity date of the acceptances secured thereby.

(b) Said Court erred in holding and deciding that defendant did not have the right to apply the proceeds of the drafts which are the subject of this action to the payment of the past due indebtedness of said Richfield Oil Company of California to defendant in the sum of $625,000 and interest.

(c) Said Court erred in holding and deciding that said acceptance agreement dated October 4, 1930, as supplemented by said acceptance agreement dated November 28, 1930, did not constitute the sole agreement entered into between said Richfield Oil Company of California and defendant with respect to the drafts deposited by said Richfield Oil Company of California with defendant for presentation or collection in foreign countries during the period commencing October 7, 1930, and ending with the appointment of complainant as receiver of said Richfield Oil Company of California on January 15, 1931.

(d) Said Court erred in holding and deciding that there was an oral agreement entered into by and between said Richfield Oil Company of California and defendant whereby the drafts, the proceeds of which are the subject of this action, were deposited with defendant for collection only and not as security for the acceptances drawn by said Richfield Oil Company of California upon defendant.

III.

Said Court erred in finding that in the month of August 1930, or at any time, an oral agreement was entered into by and between said Richfield Oil Company of California and defendant that the transactions respecting the deposit and collection of said drafts [339] should be separate and apart from all other financial transactions of said Richfield Oil Company with defendant.

IV.

Said Court erred not alone in holding and deciding that there was an agreement between said Richfield Oil Company of California and defendant to the effect that the transactions respecting the deposit and collection of said drafts were to be kept separate and apart from all other transactions of said Richfield Oil Company of California with defendant, but said Court further erred in holding and deciding that such agreement constituted a waiver by defendant of its right to a bankers lien on said drafts and the proceeds thereof, and a waiver of its right to offset said proceeds against the past due indebtedness of said Richfield Oil Company of California to defendant in the sum of $625,000 and interest.

V.

Said Court erred in holding and deciding that the drafts, or any thereof, or the proceeds thereof, were not deposited in the ordinary course of busi-

ness and said Court further erred in holding and deciding that said drafts or any thereof or the proceeds thereof were deposited with defendant under a special agreement or for any special purpose or constituted a specific deposit or trust.

VI.

Said Court erred in holding and deciding that either prior to or subsequent to the appointment of complainant as receiver of said Richfield Oil Company of California, defendant by acts, conduct, writings or statements waived its bankers lien on the proceeds of said drafts or its right to apply said proceeds to the payment of the said past due indebtedness of the said Richfield Oil Company of California to defendant. [340]

(a) Said Court erred in holding and deciding that subsequent to the appointment of complainant as receiver of said Richfield Oil Company of California, defendant by agreement with complainant waived its bankers lien on the proceeds of said drafts and its right to apply said proceeds to the payment of the said past due indebtedness of Richfield Oil Company of California to defendant.

(b) Said Court erred in holding and deciding that defendant by agreement with the other bank creditors of said Richfield Oil Company of California waived its bankers lien on the proceeds of said drafts and its right to apply said proceeds to the payment of the said past due indebtedness of said Richfield Oil Company of California to defendant.

(c) Said Court erred in holding and deciding that the exercise by defendant of its bankers lien on the proceeds of said drafts and the application of said proceeds by defendant to the payment of said past due indebtedness of Richfield Oil Company of California to defendant was a violation of any agreement entered into by and between defendant and said other bank creditors of said Richfield Oil Company of California.

VII.

Said Court erred in holding and deciding that defendant had no right to a bankers lien on said drafts and the proceeds thereof as provided in Section 3054 of the Civil Code of the State of California, and no right to apply said proceeds to the payment of said past due indebtedness of said Richfield Oil Company of California to defendant.

VIII.

Said Court erred in admitting in evidence:

(a) Testimony adduced in behalf of complainant by the [341] complainant himself and the witness Edward J. Nolan as to a meeting held on or about January 15, 1931, between representatives of the bank creditors of said Richfield Oil Company of California, with the exception of defendant, and complainant, and all conversations and statements made at said meeting, the substance of which was an agreement that all cash balances of said Richfield Oil Company of California previously appropriated by said banks should be restored to the re-

ceiver of said Richfield Oil Company of California, and that in all cases where cash balances in said banks still stood to the credit of said Richfield Oil Company of California said banks would refrain from appropriating the same to the satisfaction of their claims against said Richfield Oil Company of California. Said testimony was incompetent, irrelevant and immaterial, hearsay, and not binding on the defendant, and its introduction was an effort on the part of complainant to assert an estoppel against defendant in favor of persons not parties to this action, to-wit, the other bank creditors of said Richfield Oil Company of California.

(b) Letters and telegrams introduced by complainant, marked Plaintiff's Exhibits 4 to 11 inclusive, as set forth in the narrative statement of evidence for an appeal of this cause, being communications from various bank creditors of said Richfield Oil Company of California to complainant relating to the restoration of such balances, said documents being incompetent, irrelevant and immaterial, hearsay, and not binding on defendant, and their introduction being an effort on the part of complainant to assert an estoppel against defendant in favor of persons not parties to this action, to-wit, the other bank creditors of said Richfield Oil Company of California.

(c) Testimony adduced in behalf of complainant purporting to establish an oral agreement between defendant and said Richfield [342] Oil Company of California to the effect that all transactions

concerning the deposit and collection of foreign drafts should be kept separate and apart from all other financial transactions of said Richfield Oil Company of California with defendant, the purpose of said testimony being to vary the terms of said written acceptance agreements providing that all collateral deposited as security thereunder should likewise stand as security for all other liabilities of said Richfield Oil Company to defendant, said testimony being for that reason not properly admissible.

WHEREFORE defendant and appellant prays that the said decree be reversed and for such other and further relief as to the Court may seem just and proper.

Dated: August 10, 1933.

HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for Defendant.

Service of a copy of the foregoing Assignment of Errors is hereby acknowledged this 10th day of November, 1933.

GREGORY, HUNT & MELVIN
SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for Complainant.

[Endorsed]: Filed Aug. 10, 1933. [343]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Wells Fargo Bank & Union Trust Co., a corporation, the defendant herein, having this day pre-

sented to the above entitled Court its petition for appeal, IT IS ORDERED that an appeal be [344] allowed to said Wells Fargo Bank & Union Trust Co., a corporation, petitioner herein and defendant in the above entitled action from the decree made and entered on May 13, 1933, against said defendant, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Ninth Circuit, and that a cost bond in the sum of Five Hundred Dollars ($500.00) be executed and filed.

IT IS FURTHER ORDERED that a duly authenticated transcript of the records, proceedings, papers and all the exhibits offered in evidence by either party upon which said decree was made, be filed with the United States Circuit Court of Appeals for the Ninth Circuit according to law, as prayed for.

Dated: August 10th, 1933.

FRANK H. NORCROSS,
District Judge.

Service of a copy of the foregoing Order Allowing Appeal is hereby acknowledged this 10th day of August, 1933.

GREGORY, HUNT & MELVIN
SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for complainant and appellee.

Approved as to form, as provided in Rule 22.
GREGORY, HUNT & MELVIN
SULLIVAN, ROCHE, JOHNSON & BARRY
[Endorsed]: Filed Aug. 10, 1933. [345]

(Title of Court and Cause.)

COST BOND.

Know all men by these presents:

That we, WELLS FARGO BANK & UNION TRUST CO., a corporation, as principal, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation organized under the laws of the State of Connecticut and autho- [346] rized to transact a surety business in the State of California, as surety, are held and firmly bound unto WILLIAM C. McDUFFIE, as ancillary receiver of Richfield Oil Company of California, a corporation, in the sum of Five Hundred Dollars ($500.00) to be paid to said William C. McDuffie, as ancillary receiver of Richfield Oil Company of California, a corporation, his attorneys, successors and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents:

SEALED WITH OUR SEALS AND DATED this 11th day of August, 1933.

WHEREAS, lately in the District Court for the Northern District of California, Southern Division, in a suit pending in said Court in the above entitled action, a decree was rendered against Wells Fargo Bank & Union Trust Co., a corporation, defendant in said action, and the said Wells Fargo Bank & Union Trust Co., a corporation, having obtained an Order from said Court allowing an appeal from said decree of said Court, and a citation directed

to the complainant citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, State of California;

Now the condition of the above obligation is such that if said Wells Fargo Bank & Union Trust Co., a corporation, shall pay all the costs awarded or decreed against it by the Court in the above entitled action, then this obligation shall be void, otherwise to remain in full force and virtue.

WELLS FARGO BANK & UNION TRUST CO., a corporation,
By J. EISENBACH, V. P.
By E. H. SHINE, Assist. Cash.
Principal

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation. By DONALD MOLLBERG, Its Attorney in Fact.

[Seal] Surety.

[347]

The within bond is hereby approved this 11th day of August, 1933.

FRANK H. NORCROSS,
District Judge.

Service of a copy of the foregoing Cost Bond is hereby acknowledged this 11th day of August, 1933.

GREGORY, HUNT & MELVIN
SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for complainant and appellee.

[Endorsed]: Filed Aug. 11, 1933. [348]

(Title of Court and Cause.)

PRAECIPE DESIGNATING PORTIONS OF RECORD TO BE INCLUDED IN TRANSCRIPT ON APPEAL.

To the Clerk of the above entitled Court:

YOU ARE REQUESTED to make a transcript of record to be [349] filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled cause and to include in said transcript of record the following and no other papers or exhibits:

(a) Ancillary Bill of Complaint in Equity;

(b) Answer and defenses to Ancillary Bill of Complaint;

(c) Ancillary Amended Bill of Complaint in Equity;

(d) Answer and defenses to Ancillary Amended Bill of Complaint;

(e) Findings of fact and Conclusions of Law;

(f) Decree entered May 13, 1933;

(g) Opinion of the above entitled Court;

(h) Statement of Evidence;

(i) Petition for Appeal;

(j) Order Allowing Appeal and Fixing Amount of Bond;

(k) Cost Bond on Appeal;

(l) Assignment of Errors;

(m) Citation on Appeal; and

(n) This Praecipe for transcript of record.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or before the 30th day of November, 1933.

HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for appellant.

Service of the above Praecipe is hereby acknowledged this 17th day of November, 1933.

SULLIVAN, ROCHE, JOHNSON & BARRY
GREGORY, HUNT & MELVIN
Attorneys for appellee.

[Endorsed]: Filed Nov. 17, 1933. [350]

(Title of Court and Cause.)

CERTIFICATE OF CLERK.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 350 pages, numbered from 1 to 350, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above entitled suit, in the office of the Clerk of said Court and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing

transcript of record is $51.10; that the said amount was paid by the attorneys for the appellant, and that the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 28th day of November, A. D. 1933.

(Seal) WALTER B. MALING, Clerk.

[351] By J. P. WELSH, Deputy Clerk.

(Title of Court and Cause.)

CITATION ON APPEAL.

UNITED STATES OF AMERICA —ss.

The PRESIDENT of the UNITED STATES, to WILLIAM C. McDUFFIE, as ancillary receiver of Richfield Oil Company of California, a corporation:

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco in the State of California within thirty (30) days from the date hereof pursuant to an Order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, in a suit wherein Wells Fargo Bank & Union Trust Co,. a corporation, is appellant and you are appellee, to show cause, if any

there be, why the decree entered against the said appellant as in the said Order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE FRANK H. NORCROSS, District Judge for the Northern District of California, Southern Division, this 10th day of August, 1933.

FRANK H. NORCROSS,
United States District Judge.

Service of a copy of the foregoing Citation is hereby acknowledged this 10th day of August, 1933.

GREGORY, HUNT & MELVIN
SULLIVAN, ROCHE, JOHNSON & BARRY
Attorneys for complainant and appellee.

[Endorsed]: Filed Aug. 10, 1933. [352]

[Endorsed]: No. 7344. United States Circuit Court of Appeals for the Ninth Circuit. Wells Fargo Bank & Union Trust Co., a Corporation, Appellant, vs. William C. McDuffie, as Ancillary Receiver of Richfield Oil Company of California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 28, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.
(a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

BRIEF FOR APPELLANT.

LAWRENCE C. BAKER,
LLOYD W. DINKELSPIEL,
HELLER, EHRMAN, WHITE & McAULIFFE,
14 Montgomery Street, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO. (a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

Alleging that the proceeds of several foreign drafts, previously deposited with appellant, Wells Fargo Bank & Union Trust Co., for collection by Richfield Oil Company of California, had been improperly applied by appellant to the partial satisfaction of the general indebtedness of the Oil Company to it, William C. McDuffie, as receiver of Richfield Oil Company, appellee and respondent herein, commenced this action to recover said proceeds and prosecuted it to Judgment against appellant in the sum of One Hundred Forty-four Thousand Two Hundred Eighty-

nine and 73/100 Dollars together with interest to the date of judgment in the sum of Nineteen Thousand and Sixteen and 12/100 Dollars.

Broadly, the questions which this appeal presents are (1) whether under all the circumstances appellant was vested either with a contractual lien or a banker's lien, or both, upon the drafts in question, the existence of which would sustain the appropriation of the proceeds of the drafts as aforesaid, and (2) whether if such lien existed the bank had by agreement or conduct waived it, or was otherwise estopped to assert the same. The lower Court held, erroneously appellant submits, that the bank was not thus vested with the lien claimed by it, and furthermore that, if such lien existed, appellant had waived it.

(a) Facts.

On July 12, 1930, Richfield Oil Company of California became indebted to appellant in the sum of $625,000.00 on a promissory note payable ninety days after date with interest at 6% per annum. Said note, at the time of its execution, was unsecured.

On October 6, 1930, Richfield Oil Company completed negotiations with appellant for the transfer of its foreign banking business to appellant from another bank, with the facilities of which it had become dissatisfied. These negotiations were conducted in behalf of Richfield by the Manager of its Foreign Department, Robert L. Hall, who appeared as a witness for appellee on the trial of this action; and in behalf of appellant mainly, but not exclusively, by

the Assistant Manager of its Foreign Department, William G. Gilstrap, who testified for appellant at the trial.

At the time of the transactions herein involved Richfield Oil Company was engaged extensively in the shipment of its products to customers in foreign countries. A search for better facilities for the collection of its drafts drawn upon these customers ultimately brought it into negotiation with appellant. To this end, Mr. Hall made three trips from Los Angeles to San Francisco where he conferred with Mr. Gilstrap and other officials of Wells Fargo Bank & Union Trust Co. The probative facts and circumstances surrounding these trips will be discussed in the argument hereinafter set forth.

Since Richfield was interested in receiving advances of credit based on its foreign drafts, rather than in simply depositing the drafts for collection, it was offered a choice between the discount and the acceptance credit method of handling draft collections. The latter method carried a saving in collection and interest charges as compared with the discount method. Therefore the parties finally determined that the foreign draft collection business of Richfield Oil Company with appellant should be done on an acceptance basis.

The mechanics of the acceptance method differ from those involved in the ordinary draft collection transaction in that the customer of the bank first executes an acceptance agreement which specifies a sum up to which the customer may draw upon the bank by

means of acceptances based upon drafts deposited for collection. Thereafter, when the customer deposits drafts for collection, he draws acceptances (drafts) on the bank in amounts agreed upon, based upon the drafts, and the bank advances to the customer the amount of the acceptances less the interest which it has calculated will accrue during the period prior to the maturity of the acceptances. The bank accepts the acceptances (drafts), thereafter selling them in the open market to persons interested in that type of commercial paper. When the acceptances mature according to their terms, the bank pays the holders thereof, and reimburses itself from the proceeds of the drafts which have been deposited as aforesaid. In the event there should be no proceeds of drafts on hand at that time, the bank looks to the drawer of the acceptances for reimbursement.

Such an acceptance agreement in favor of appellant was executed by Richfield Oil Company (R. 252, 253, 254, 255, 256, 257), and on the 6th day of October, 1930, was delivered to appellant by Mr. Hall. The amount specified in this agreement up to which Richfield Oil Company was entitled to draw acceptances on appellant, was $150,000.00.

Among the foreign customers of Richfield at that time was the firm of Birla Bros. Ltd., in Calcutta, India. Each shipment from Richfield Oil Company to this firm customarily would go forward under two drafts, each in the amount of one-half of the purchase price of the shipment, but one of which would be payable at sight and one payable at 180 days after

sight. When the shipment would arrive, Birla Bros. would pay the amount of the sight draft and accept the 180 day draft, thereby becoming entitled to the shipping documents which enabled it to obtain delivery of the goods.

On October 8, 1930, Mr. Hall personally presented to appellant two sets of drafts (R. 267, 270), each drawn against separate shipments to Birla Bros. Ltd. A letter of transmittal (R. 266, 268), personally delivered to appellant by Mr. Hall, accompanied each set of drafts. Each of the drafts covering one of the shipments was in the face amount of $63,950.00, and each of the drafts covering the other shipment was in the face amount of $55,900.75. In each set of drafts one thereof was payable at sight and one thereof at 180 days sight, so that there was a total of $119,850.75 in sight drafts and an equal amount of 180 day drafts deposited at that time. Upon the delivery of these drafts, appellant accepted nine acceptances in the total sum of $115,000.00. Each acceptance bore a maturity of 90 days after date. A deposit of said sum of $115,000.00 was immediately made in appellant bank in favor of Richfield Oil Company and against which Richfield was enabled to draw as it saw fit.

From the time of the presentation of these drafts drawn on Birla Bros. on October 8, 1930, until January 15, 1931, the date upon which appellee was appointed receiver for Richfield Oil Company, a great number of drafts drawn on customers of Richfield located in foreign countries were deposited with appellant for collection. By November 28, 1930, Rich-

field Oil Company had drawn acceptances on appellant in the total sum of $155,000.00, the extra sum of $5000.00 over and above the amount specified in the acceptance agreement having been covered by the execution of an additional acceptance agreement in the sum of $5000.00. (R. 289.) After November 28, 1930, no further acceptances were drawn.

On December 16, 1930, the sum of $119,512.54, representing the net proceeds of the two hereinbefore mentioned sight drafts drawn on Birla Bros. Ltd. were received by appellant. These proceeds were immediately applied to the payment of the first set of acceptances in the sum of $115,000.00 in anticipation of the maturity thereof.

Thereafter appellant continued to receive the proceeds of drafts which had been deposited as aforesaid, and to apply such proceeds to the payment of acceptances. On February 26, 1931, the last of the unpaid acceptances matured and was satisfied from the proceeds of drafts so collected. Thereafter the proceeds of several drafts which were still outstanding were collected by appellant and were deposited to the credit of appellee in his account with the bank.

On May 8, 1931, the sum of $119,850.75, representing the proceeds of the 180 day Birla Bros. drafts hereinbefore mentioned was received by appellant. Thereupon appellant took the action which precipitated the controversy involved herein. Richfield Oil Company was then in receivership. As previously stated, appellant was a creditor of Richfield to the extent of $625,000.00 represented by a matured note,

unsecured by mortgage or any specific pledge of collateral. Each of the acceptance agreements however contained the following provision:

> "All bills of lading, warehouse receipts, and other documents of title and all money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted. * * *"
>
> (R. 253.)

> "In case of any sale or other disposition of the whole or any part of the security or property aforesaid, you may apply the proceeds of such sale or disposition to the payment of all legal or other costs and expenses of collection, sale and delivery and of all expenses incurred in protecting the security or other property or the value thereof, as hereinafter provided and may apply the residue of such proceeds to the payment of this or of any then existing liability of ours to you whether then payable or not * * *."
>
> (R. 255, 256.)

At this time the California Civil Code provided (and still provides):

> "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."
>
> *Civil Code,* §3054.

Relying upon the foregoing provisions of the acceptance agreement and the law with respect to the lien of bankers and the right of offset, appellant

applied the said proceeds of the 180 day Birla Bros. drafts to the partial satisfaction of the general indebtedness of Richfield Oil Company to it.

Appellee disputed the right of appellant to make this application of the proceeds of said drafts, claiming that the two 180 day sight drafts drawn on Birla Bros. were not deposited with appellant under and subject to the acceptance agreement, and therefore that the contractual lien, which otherwise would have been conferred upon appellant by the above-quoted provisions of the acceptance agreement, was non-existent. Appellee based this conclusion mainly upon the refusal of appellant to issue acceptances in a sum over and above the amount of the sight drafts drawn on Birla Bros., considering only the amount of the sight drafts in determining that the sum of $115,000.00 evidenced by acceptances in that amount, would be advanced against the shipment. Appellee's further claim that appellant was not entitled to a banker's lien was based upon a statement alleged to have been made by Mr. Hall to officers of the appellant during the negotiations for the transfer of Richfield's foreign business to appellant to the effect that all transactions of the Foreign Department of Richfield Oil Company should be kept separate and apart from all other financial transactions and affairs of Richfield with appellant. Appellee's position in this respect is that this alleged statement and the alleged acquiescence therein by appellant amounted to an agreement by which appellant waived its banker's lien on the drafts. As to these statements and

the extent thereof, the evidence is in conflict. In further support of his contention that appellant was without right to make such application of the proceeds of said drafts, appellee relied upon telegrams (R. 209, 210) exchanged between the parties to this action at the time of the appointment of appellee as receiver of Richfield Oil Company and upon conduct of appellant occurring after the appointment of appellee as receiver, from all of which appellee contends that appellant waived its banker's lien and right of setoff. Said telegrams and said conduct of appellant will be discussed and described in detail in the argument hereinafter set forth.

Besides the proceeds of the two 180 day sight drafts drawn on Birla Bros., hereinbefore mentioned, the proceeds of two other drafts form part of the subject matter of this litigation. One of these is a third draft drawn on Birla Bros. at 180 days sight in the sum of $23,607.50. This draft was deposited with appellant for collection on January 8, 1931. The other draft, the proceeds of which are involved herein, was drawn on one, Ricardo Velazquez, in the sum of $1,219.00. This draft was deposited with appellant on December 27, 1930. Appellee bases his conclusion that these drafts were not deposited under and subject to the terms of the acceptance agreement upon the ground that they were deposited at a time subsequent to the issuance of the last acceptance (but admittedly before payment of all acceptances), and therefore, according to appellee's contention, they had no place under the acceptance agreement.

By way of recapitulation, the following schedule more clearly shows the drafts, the proceeds of which are the subject of this action:

Exhibit No.	Date Deposited	Draft No.	Customer	Amount	Time
	1930				
22	Oct. 8	103005	Birla Bros.	$63,950.00	180 days
23	Oct. 8	103006B	Birla Bros.	55,900.75	180 days
79	Dec. 27	123014	Ricardo Velazquez	1,219.00	60 days
	1931				
82	Jan. 8	13107	Birla Bros.	23,607.50	180 days

The numbers of the drafts designated were given to them by Richfield Oil Company. Appellant gave each draft its own number for the purpose of its records, but the Richfield number (appearing more frequently in the exhibits herein) will be applied to all drafts in this brief for the sake of convenience. The first two figures of the draft numbers refer to the month and the second two to the year in which the draft was drawn. The last two refer to the chronological number of the draft drawn in the particular month. (R. 290.) Thus, draft No. 123,014 was the fourteenth draft issued in the month of December, 1930.

Appellee's complaint seeks in addition to recover the sum of $469.06, representing part of the proceeds of draft No. 103,012 drawn on Bueno y Cia and deposited with appellant October 11, 1930. This draft was paid in installments, part of which were used to liquidate acceptances. The sum last mentioned represented the last installment which was received

in May, 1931. The trial Court found that this draft was deposited under and pursuant to the acceptance agreement, and therefore that it was properly applied toward the satisfaction of the indebtedness of Richfield Oil Company. (R. 188, 189, Finding XV; 195, 196, Conclusion VII.) This is conceded by appellee.

(For a complete schedule of all drafts deposited by Richfield with appellant, except the first four on Birla Bros., see page 293 of Record.)

(b) Issues.

At the trial of this action, appellant contended and here again contends that this case is not a difficult one; that the facts are neither complex nor for the most part disputed; that almost without exception appellant would have stipulated to the great mass of documentary evidence introduced by appellee. Appellant respectfully submits that the volume of testimony and the number of exhibits should not cloud the issues, which, in the opinion of appellant at least, may be simply stated and upon the facts and the law definitely determined. There cannot possibly be other issues than these:

(1) Were the drafts, the proceeds of which are the subject of this litigation, deposited under the acceptance agreement (R. 252, 253, 254, 255, 256, 257) and therefore subject to the provisions hereinbefore quoted therefrom? If they were, the second question is no longer in issue. If the Court decides that they were not delivered under and pursuant to the acceptance agreement, then

(2) Were they ever deposited under such an agreement as amounted to a waiver of appellant's banker's lien or right of setoff?

(3) Did appellant, subsequent to the appointment of the receiver, waive its contractual right or right to a banker's lien or setoff with respect to the proceeds of said drafts in such manner as legally to preclude it by estoppel or otherwise from relying thereon in this litigation?

(c) Statement of Appellant's Position.

Although appellant refused to advance to Richfield by means of acceptances or otherwise a sum in excess of the amount of certain sight or short term drafts, appellant's contention is that all drafts were nevertheless deposited as security for the acceptances issued and to be issued, and consequently were deposited under and pursuant to the acceptance agreements. These agreements constituted a contract between Richfield Oil Company and appellant, under the express terms of which appellant was entitled to hold all drafts, and the proceeds thereof, deposited under the acceptance agreements, as security, not alone for the acceptances issued thereunder, but likewise for "any other liabilities from us (Richfield) to you (appellant) whether then existing or thereafter contracted." No agreement to keep the transaction separate or apart, even if, as claimed by appellee, such an agreement amounts to a waiver of banker's lien, could vary by parol the quoted language of this written contract.

If, in spite of the overwhelming evidence of conversations, acts and records of both Richfield Oil Company and appellant in support of the contention that the drafts in dispute were deposited under the acceptance agreement, it should be determined that they were not so deposited, then admittedly they were at least deposited for collection, giving appellant the right to exercise its banker's lien and right of setoff against them and the proceeds thereof. There was no agreement to waive this lien or right of setoff even though it be determined that Mr. Hall unqualifiedly informed the officers of appellant that all of these transactions were to be kept "separate and apart". Such an agreement, as will subsequently be established, did not bring about a waiver of appellant's banker's lien or right of setoff.

It is the contention of appellee that subsequent to his appointment as receiver of Richfield Oil Company, a telegram (R. 209) which was sent by appellant to him in response to a telegram (R. 210) sent by him to appellant, plus the conduct of appellant subsequent to this exchange of communications, effected a waiver of appellant's lien. The reasoning by which appellee reaches this conclusion will be discussed later. In this connection appellant urges that:

(a) Appellant was not required to protect its rights by any reservation of its lien on the drafts in question in its said telegram of January 16, 1931;

(b) The language of the telegram with respect to the reservation actually made by appel-

lant, should be construed in a normal and ordinary manner to give to it the interpretation obviously intended;

(c) There was not in this exchange of telegrams or otherwise, any waiver or agreement to waive amounting to a contract nor was there any consideration for such alleged waiver;

(d) Appellee as receiver is not entitled herein to assert the rights of the other bank creditors of Richfield based upon an estoppel against appellant.

It is to all of the foregoing contentions that appellant will direct its consideration of the evidence and presentation of authorities.

II.

SPECIFICATION OF ERRORS.

The errors assigned by appellant are in substance as follows:

I.

The trial Court erred in granting a decree ordering payment to appellee by appellant of the sum of $163,305.85 for the reason that it appears from the record in this case that appellant is entitled to retain said sum and that appellee is not entitled to the same or any part thereof. (R. 476, 477. Assignment of Error I.)

II.

The trial Court erred in holding and deciding that the drafts, the proceeds of which are the subject of

this action, were not deposited under and pursuant to the acceptance agreements hereinbefore mentioned; that the banker's acceptances drawn by Richfield Oil Company of California upon appellant were secured only by foreign drafts of an aggregate amount slightly in excess of the amount of acceptances so issued, and only by drafts having a maturity shorter than the maturity of said acceptances, the proceeds of which could be and actually were received by appellant in San Francisco at least one day before the maturity date of the acceptances secured thereby; that appellant had no right to apply the proceeds of said drafts to the payment of the past due indebtedness of Richfield Oil Company of California to appellant in the sum of $625,000.00 and interest; that the acceptance agreement of October 4, 1930, as supplemented by the acceptance agreement of November 28, 1930, did not constitute the sole agreement entered into between Richfield and appellant respecting the deposit and collection of foreign drafts; and that there was an oral agreement entered into between appellant and Richfield Oil Company that said drafts were deposited with appellant for collection only and not as security for the acceptances drawn by Richfield Oil Company upon defendant. (R. 477, 478. Assignment of Error II.)

III.

The trial Court erred in finding that in the month of August, 1930, or at any time an oral agreement was entered into by and between said Richfield Oil Company and appellant; that the transactions respecting the deposit and collection of said drafts

should be separate and apart from all other financial transactions of said Richfield Oil Company with appellant. (R. 479. Assignment of Error III.)

IV.

The trial Court erred in holding that such an agreement, if any there was, constituted a waiver by appellant of its right to a banker's lien on said drafts and the proceeds thereof, and a waiver of its right to offset said proceeds against the past due indebtedness of said Richfield Oil Company of California to appellant in the sum of $625,000.00 and interest. (R. 479, Assignment of Error IV.)

V.

The trial Court erred in deciding that the said drafts or any thereof or the proceeds thereof were not deposited in the ordinary course of business, and said Court further erred in holding and deciding that said drafts or any thereof or the proceeds thereof were deposited with appellant under a special agreement or for any special purpose or constituted a specific deposit or trust. (R. 479, 480. Assignment of Error V.)

VI.

The trial Court erred in holding and deciding that either prior to or subsequent to the appointment of appellee as receiver of said Richfield Oil Company of California, appellant by acts, conduct, writing or statements or by agreement with appellee or with the other bank creditors of said Richfield Oil Company, waived its banker's lien on the proceeds of said drafts

or its right to apply said proceeds to the payment of said past due indebtedness of the Richfield Oil Company of California to appellant. (R. 480, 481. Assignment of Error VI.)

VII.

Said Court erred in holding and deciding that appellant had no right to a banker's lien on said drafts and the proceeds thereof as provided in Section 3054 of the Civil Code of the State of California, and no right to apply said proceeds to the payment of said past due indebtedness of said Richfield Oil Company to appellant. (R. 481. Assignment of Error VII.)

VIII.

Said Court erred in admitting in evidence:

(a) Testimony adduced in behalf of appellee by the witnesses William C. McDuffie and Edward Nolan as to a meeting held on or about January 15, 1931, between appellee and representatives of the bank creditors of said Richfield Oil Company of California, with the exception of appellant, and all conversations and statements made at said meeting, the substance of which was an agreement that all cash balances of Richfield previously appropriated by said banks should be restored to the receiver of Richfield, and that in all cases where cash balances in said banks still stood to the credit of Richfield, said banks would refrain from appropriating the same to the satisfaction of their claims against the company. Said testimony was incompetent, irrele-

vant and immaterial, hearsay, and not binding on appellant, and its introduction was an effort on the part of appellee to assert an estoppel against appellant in favor of persons not parties to this action, to-wit, the other bank creditors of Richfield.

(b) Letters and telegrams introduced by appellee marked Plaintiff's Exhibits 4 to 11 inclusive, as set forth in the Narrative Statement of Evidence for use in the appeal of this cause, being communications from various bank creditors of said Richfield Oil Company of California to appellee relating to the restoration of such balances, said documents being incompetent, irrelevant and immaterial, hearsay, and not binding on appellant, and their introduction being an effort on the part of appellee to assert an estoppel against appellant in favor of persons not parties to this action, to-wit, the other bank creditors of said Richfield Oil Company of California.

(c) Testimony adduced in behalf of appellee purporting to establish an oral agreement between appellant and said Richfield Oil Company of California to the effect that all transactions concerning the deposit and collection of foreign drafts should be kept separate and apart from all other financial transactions between Richfield and appellant, the purpose of said testimony being to vary the terms of said written acceptance agreement providing that all the collateral deposited as security thereunder should likewise

stand as security for all other obligations of said Richfield Oil Company of California to appellant, said testimony being for that reason not properly admissible.

(R. 481, 482, 483. Assignment of Error VIII.)

III.

ALL THE DRAFTS IN LITIGATION WERE DEPOSITED BY RICHFIELD WITH APPELLANT UNDER AND SUBJECT TO THE ACCEPTANCE AGREEMENTS, PURSUANT TO THE TERMS OF WHICH APPELLANT HELD THE DRAFTS AS SECURITY FOR THE GENERAL INDEBTEDNESS OF RICHFIELD TO IT.

The question presented by this phase of the case can be answered only from necessary and proper inferences to be drawn from the facts and circumstances, for the record is barren of any express agreement between Richfield Oil Company and appellant stating whether the drafts in question were or were not to be placed under acceptance agreements.

The lower Court held in its Finding No. XVII (R. 189, 190) that the drafts which form the subject of this litigation were not deposited under the acceptance agreement as security for acceptances. Appellant has specified this as error (R. 477, 478, Assignment No. I), relying, not upon any particular conflict in the facts, for little, if any such conflict on material points appears in the evidence, but on the impropriety of the conclusion which the trial Court reached from these facts. This appeal being in equity, the trial Court's findings are not binding on this Court

and, because the finding is a mere conclusion from the facts, it has herein even less weight than usual.

(a) History of the Inception of the Transactions.

On or about the 22d day of August, 1930, Robert L. Hall, the Manager of the Foreign Department of Richfield Oil Company of California, visited San Francisco (R. 340) for the purpose of opening negotiations for the transfer of Richfield's foreign draft collection business to appellant. On this occasion, a series of conferences took place between Mr. Hall, William G. Gilstrap, Assistant Manager of appellant's Foreign Department, Frederick J. Hellman, Vice President of appellant in charge of the Foreign Department, and Mr. F. L. Lipman, President of the bank. A reference to the testimony of each of these persons concerning this visit (R. 340, 341, 342, 343, 344, 369, 370, 436, 437, 438, 439, 448, 449) shows that negotiations on this occasion were merely preliminary in character. The relative merits of the banker's acceptance method of handling collections as compared with the discount method were discussed. Mr. Hall spoke in a general way of the foreign customers of Richfield, including Birla Bros. Ltd. At a short meeting with Mr. Lipman (R. 448, 449, 436, 437, 438, 439) at which Mr. Hellman was present, Mr. Hall was informed by Mr. Lipman that appellant would be willing to extend to Richfield Oil Company a line of credit based upon foreign drafts in addition to the loan accommodations which appellant already had given Richfield. The amount of this line of credit, as Mr. Lipman informed Mr. Hall, was to be fixed

at a figure between $150,000.00 and $250,000.00. (R. 449.) After the conference with Mr. Lipman, Mr. Hellman informed Mr. Hall that the amount of the credit which appellant would extend to Richfield in this manner would be the sum of $150,000.00. (R. 439.)

Since Hall was not authorized to bind Richfield Oil Company in financial transactions (R. 358), he found it necessary to return to Los Angeles in order to bring the matter to the attention of the officials of Richfield.

Prior to October 1, 1930, Hall telephoned to Gilstrap informing him that Richfield had decided to avail itself of the acceptance credit. At that time he asked Gilstrap to send to him the necessary forms for execution. (R. 370.)

On the morning of October 6, 1930, Mr. Hall, accompanied this time by Homer Pope, who was then a clerk in Richfield's Foreign Department, returned to San Francisco. (R. 251, 371.) Hall and Pope brought with them the acceptance agreement to which reference has previously been made (R. 251), duly executed under date of October 4, 1930, for and in behalf of Richfield Oil Company, by R. W. McKee, Vice President, and W. R. Hart, Treasurer. They also brought with them fourteen acceptances signed by Richfield Oil Company in the total amount of $150,000.00. These acceptances and the acceptance agreement were delivered to appellant through Gilstrap. (R. 346.)

Thereupon appellant accepted $115,000.00 worth of acceptances and sold them. The proceeds of these acceptances were received by Hall on the same day and were transmitted by him to Richfield in Los Angeles by means of telephoto.

(b) The Circumstances Surrounding the Inception of the Foreign Draft Collection Transactions of Richfield Oil Company of California With Appellant Prove That the Drafts Were Deposited Under and Subject to the Acceptance Agreements.

(1) There Was But One Agreement Entered Into Between Appellant and Richfield Oil Company.

From the history of the original negotiations between Richfield and appellant, as hereinbefore set forth, it is obvious that the execution and delivery of the acceptance agreement was the vital factor around which everything else which followed was bound. Since the parties had agreed upon the acceptance credit method, the execution and delivery of this acceptance agreement was the condition precedent to the commencement of business.

There is nothing in the entire record of this case, apart from mere opinions of appellee's own witnesses, which could possibly be considered as evidence of an agreement, independent of the acceptance agreement itself, by the terms of which certain drafts were to be deposited under the acceptance agreement and certain drafts were not.

The significant thing is that as a result of the preliminary negotiations in August, *the parties decided to do business on an acceptance credit basis and on an acceptance credit basis only.* To vitalize this deci-

sion, Richfield executed and delivered the acceptance agreement. Thereafter, *in pursuance of the decision to do business in this manner,* Richfield commenced the deposit of the foreign drafts for collection.

Mr. Pope in response to questions propounded by counsel for appellee endeavored to testify that the 180 day drafts were deposited solely for collection and not as security for acceptances. This was a mere conclusion of the witness. Not alone is this denied repeatedly in the testimony of Messrs. Gilstrap, Leuenberger and Hellman, but Mr. Hall, himself (and it must be remembered that Mr. Hall was present throughout the sole conference which Mr. Pope attended), testified on direct examination, flatly contradicting Pope, as follows:

> "I don't think there was anything said by Mr. Gilstrap or by myself and Mr. Pope during that conversation as to how the 180 day paper would be handled."
>
> (R. 346.)

Subsequently, in response to the repeated questioning of counsel for appellee with respect to the depositing of the 180 day drafts for collection, he further testified:

> "To the best of my knowledge, the only remark that was made as to what would be done with the 180 day drafts was that Mr. Gilstrap said when I turned over the entire papers that he would send them all together to the correspondent in Calcutta. I don't remember anything having been said in the prior conversations occurring between myself and Mr. Gilstrap respecting the collection of the 180 day drafts."
>
> (R. 348.)

It is apparent that Mr. Pope's memory, in this respect at least, is faulty.

The foregoing undisputed (except for Pope's contradicted testimony) facts compel the conclusion that all drafts were deposited as a result of and in pursuance of the decision to do business on an acceptance credit basis; although subsequently the amount of the acceptances actually issued was far less than the total face amount of the drafts deposited, nevertheless, all drafts were deposited as security for the acceptances and as integral parts of a preconceived plan, the substance of which is found in the terms of the acceptance agreement.

(2) The Officers of Appellant Informed Mr. Hall That Advances Would be Made Against All of the Foreign Drafts Deposited by Richfield Oil Company of California.

The fundamental reason underlying appellee's contention and the Finding of the lower Court that the first two 180 day Birla drafts were not deposited as security for banker's acceptances, and consequently not deposited under the acceptance agreement, is found in the statements by Gilstrap to Hall that appellant would advance only the approximate amount of the two sight drafts under acceptances with maturities of 90 days from date, and that only drafts with maturities of less than 90 days would be considered as bases for acceptances. (R. 346, 262, 263.) As to the third Birla draft, No. 13,107, deposited on or about January 8, 1931, and the draft on Ricardo Velazquez, No. 123,014, deposited on the 27th day of December, 1930, appellee claims that since no accep-

tances were issued after November 28, 1930, these drafts could not have been deposited as security for acceptances. This overlooks the fact that there were at these times unmatured and unpaid acceptances still outstanding.

It is the contention of appellant that every draft deposited with it during the period commencing with October 8, 1930, and ending on January 15, 1931, was deposited as security for acceptances and consequently under the acceptance agreement.

That this was the understanding of the officers of appellant and that this understanding was communicated to Hall at the inception of these transactions, is conclusively shown by the testimony of both Mr. Lipman and Mr. Hellman, corroborated by Mr. Hall. Mr. Lipman testified as follows:

> "I received a visit from a representative of the Foreign Department of the Richfield Oil Company in the month of August, 1930. This representative, Mr. Hall, stated that there had been some prior discussion as to this line of business, and I think I said something to the effect that if these drafts were good security, that is, if they were drawn on people we had confidence in, *we could regard those as collateral for an acceptance credit.* This representative assured me that the drafts were quite all right."
>
> (R. 448, 449.)

In this connection Mr. Hellman testified as follows:

> "To the best of my recollection I told Mr. Hall that I thought that we, meaning the Wells Fargo Bank, would be willing to go into such a trans-

action *advancing them on their collections,* and that I could see nothing that would stop us from doing it, but as long as they had other lines in the bank I would rather consult with Mr. Lipman first."

(R. 436.)

Mr. Hall's testimony in this regard is as follows:

"Mr. Lipman told me that he had heard good reports from his Foreign Department in regard to collections of the Foreign Department of Richfield. Mr. Lipman stated that he had accommodated Richfield to a large extent and also had accommodated Mr. Talbot, and he would give a further line of credit *based* on foreign drafts in the amount of $150,000.00 or thereabouts and see how it would work out."

(R. 343.)

"I don't think Mr. Lipman stated that he would advance $150,000.00 or $200,000.00 upon the security of our foreign collections—I think he used the word 'drafts'. To the best of my recollection Mr. Lipman's statement was that *he would advance upon the security of our foreign drafts $150,000.00 to $200,000.00.*"

(R. 358.)

In all of this testimony of witnesses on both sides *a line of credit based on foreign drafts* was referred to.

This testimony leaves no room for doubt that from the outset the officers of appellant did not intend to make any distinction between drafts that were to be deposited with them, except to limit the *amount*

of advances to the extent of drafts maturing in 90 days or less, but did intend that all drafts should be security for acceptances. Since this intention was definitely communicated to Hall, who acted for Richfield in the entire transaction, Richfield and appellee stand bound by it.

On the same day that these statements were made, Hellman decided, after the conference with Mr. Lipman, that the extent of the credit which would be granted against the foreign drafts would be $150,000.00, and he so informed Hall. (R. 439.) From his long experience with Richfield's Foreign Department, which he organized and built up, Hall must have known then that the amount of foreign drafts which Richfield would have outstanding at any one time would soon far exceed the sum of $150,000.00, the limit of the credit. He must have known then that the next shipment to Birla Bros. would in all probability far exceed the sum of $150,000.00, and in fact it did. Therefore, he knew or should have known, in the light of the statements made to him by Hellman and Lipman, as hereinbefore set forth, that there would be deposited a great many drafts which would not be used in *measuring* the amount of advances under the acceptances, but which appellant would nevertheless consider as security for acceptances.

It is submitted that the fact that some of the foreign drafts were not used as a basis for measuring the advances which were made to Richfield Oil Company is not a sound reason for the conclusion that

these drafts were not deposited as *security* for the acceptances. The most usual practice followed by lenders in taking security for their loans requires the value of such security to exceed greatly the amount of the loan. A simple analogy may here be cited as illustrating what the transaction between appellant and Richfield really was:

A man goes to his banker with $10,000.00 in Liberty Bonds and $10,000.00 face value of unmarketable securities, and asks the banker: "How much will you lend me *against* these securities?" The banker says: "We will not take into consideration your unmarketable securities, but will lend you to the extent of your Liberty Bonds, viz., $10,000.00." All the securities are deposited. There is no doubt that the loan is against all of the securities, but only in an amount based on the Liberty Bonds. All are security,—even the unmarketable bonds having no value. If we transpose Liberty Bonds into sight or short term or other satisfactory drafts, and transpose the unmarketable securities into 180 day or other unsatisfactory drafts, we have the case at bar.

Appellee answered this analogy in the lower Court with the argument that if the hypothetical borrower had gone to his banker with $10,000.00 in Liberty Bonds and $10,000.00 face amount of unmarketable securities (for instance, notes receivable) and asked the banker: "How much will you lend me against these securities?" and the banker had said: "We are willing to lend you $10,000.00 upon your Liberty Bonds, but will lend you nothing upon your notes

receivable, although we will be glad to take them for collection, charging you the usual commission for making the collection," no Court would listen to any claim on the part of the banker that the loan was secured by the notes receivable as well as the Liberty Bonds. This answer is simple of disposition. It is not sustained by the evidence and is contrary to common experience. Even if the Liberty Bonds were sufficient in and of themselves to support a loan of $10,000.00, what banker would refuse the added margin of safety from further security, regardless of its value? It is but natural to accept all the security that may be forthcoming. For the same reason, all the probabilities, in addition to the evidence, point to the conclusion that appellant did the same thing with respect to the deposit of foreign drafts by Richfield.

(3) The Testimony of Appellee's Own Witnesses Substantiates Appellant's Position.

The testimony of Mr. Pope is convincing that he misunderstood the nature of the transaction into which Richfield was entering for his conclusion that the 180 day paper was not to be deposited as security for acceptances is not supported by his premise. Thus, Mr. Pope testified:

> "The question came up as to whether we might base acceptances on both sets of drafts. He told us he would be glad to consider the sight draft but because of the length of time and because of the credit standing, he would not consider the 180 day drafts on Birla Bros. We argued with him that we had never had any trouble with

> Birla Bros. and that they had always been very prompt pay, and we urged him to let us use the 180 day drafts *as a basis for bank acceptances,* but he refused."
>
> (R. 262.)
>
> "I believe that Mr. Gilstrap and Mr. Leuenberger said: 'we cannot use as a *basis* for the amount of your acceptances the 180 day paper on Birla Bros.' They did not tell me as I remember it that they waived the *security* of that paper because I do not believe that came into the discussion."
>
> (R. 319.)

All of this testimony supports the soundness of appellant's position. For, by the use of the word "basis," appellee's witness has demonstrated that the 180 day drafts simply were not to be considered in measuring the amount of the advance which would be made to Richfield by means of acceptances. This, however, by no means contradicts appellant's contention that the acceptances were issued *against* the 180 day paper, as well as the sight paper, and that all were security for the acceptance.

Counsel for appellee, at the trial, attempted to answer this point with the argument that in most of the cases where Pope testified in this manner, he did so in response to a question in which the word "basis" was used. Although the record on this appeal does not, of course, show the questions which were put to the witness, the truth is that the witness first testified in this manner voluntarily in response to

questions put to him by his own counsel, in which this word was not used.

Counsel further argue that the meaning of this word when used by the witness necessarily must depend upon the meaning intended to be given to it by the person testifying; and that in order to ascertain such meaning, reference should be had to all of the witness's testimony upon the subject matter in connection with which the word "basis" was used. Counsel overlook, however, that the witness was testifying as to *what was said* at the time of the conference. He was not then drawing a conclusion. On the other hand, his ultimate conclusion that the 180 day drafts were not security for acceptances, deduced from what was said as to using the 180 day drafts as a *basis* for acceptances, is unwarranted, and in any event, is immaterial; the use of the word "basis" cannot be explained away in the manner counsel have attempted.

Counsel further rely upon the following testimony of Pope as showing what meaning he intended to convey by the use of the word "basis":

> "He told us that it would be necessary to put up a sufficient amount of drafts in money to cover the bank acceptances. It would only be necessary to have enough from the proceeds of the drafts to cover the bank acceptances to be paid."
>
> (R. 263.)
>
> "To the best of my knowledge there was also an agreement that the 180 day drafts would be accepted for collection only and not be used as a

basis for the issuance of acceptances. The Richfield Oil Company was only required to deposit sufficient drafts, the net proceeds of which would satisfy the amount of the bank acceptances."
(R. 314.)

This testimony, however, is consistent with the claim of appellant that these drafts were all deposited as security for acceptances even though only the approximate amount of the sight drafts was advanced. Simply because the minimum requirement may have been that Richfield deposit short term drafts in an amount at least equal to the amount advanced by appellant, it does not follow that appellant was precluded from the acceptance of drafts, as security, in a much greater amount than that of the banker's acceptances issued.

(4) Appellee's Case Is Largely Based on the Misconception of the Witness Pope.

Appellee's contention that the drafts, the proceeds of which are the subject of this litigation, were not deposited under the acceptance agreement, rests upon an imaginary distinction between drafts supposedly deposited solely for collection, and those supposedly specifically designated as security for acceptance. The fact that the evidence does not support any agreement other than the acceptance agreement regarding the deposit of drafts for collection has hereinbefore been discussed.

Granting that appellee is in good faith in the contention that certain drafts were under the agreement

and others not, it occurs to appellant that the error in appellee's belief arose through Mr. Pope's misunderstanding of a new and to him strange transaction. He testified in substance that Mr. Gilstrap told him that the proceeds of the draft which were under the acceptances must be in San Francisco before the maturity date of the acceptances issued on the drafts. (R. 261.) The Court's finding to this effect (Finding No. XVII, R. 189, 190), has been specified as error. (Assignment No. II, R. 477, 478.) Gilstrap testified that there was no such statement made to any representative of Richfield. (R. 373.) Gilstrap stated, however, and appellant believes this to be the source of Pope's error (R. 373), that the acceptance agreement required that Richfield pay the *acceptances* at the office of appellant at least one day before the maturity of the *acceptances*. The provisions of the acceptance agreement in this respect are as follows:

> "In consideration of your acceptance of the said draft or drafts the undersigned, jointly and severally, agree to pay you at the time of the acceptance a commission of —— per cent, and further agree to pay you the amount of the said draft or drafts at your office one day before maturity."
>
> (R. 253.)

The use of the word "drafts" in the agreement may be confusing. The explanation is that an acceptance is a draft prior to its acceptance by the bank and the agreement, in referring to the "drafts" to be issued on the security thereunder, described Richfield's acceptances. This cannot be controverted.

In answer to this contention, appellee at the trial argued that there is evidence in this case that appellant would not have issued acceptances on the unsecured signature of Richfield Oil Company, since at that time Richfield was already indebted to appellant to a large extent on a loan which was then unsecured. Therefore, it was argued, appellant was looking solely to the proceeds of the drafts for its payment and must necessarily have required that such proceeds be on hand at least one day prior to the maturity date of the acceptances. This, however, overlooks the fact that even though the proceeds of the drafts should not be received in advance of the maturity date of the acceptances, and even though Richfield Oil Company should fail to pay the amount of the acceptances one day in advance of the maturity date thereof, appellant still would have the security of the drafts and proceeds thereof. Furthermore, the mere fact that the drafts, by their terms, provided for payment prior to the maturity of the acceptances was no guaranty that they would be paid then; the probability of payment on short term drafts is no greater than on long term drafts. Thus appellant looked to Richfield Oil Company as maker of the acceptances, taking, however, the security of drafts which would mature either before or after the maturity date of the acceptances.

(5) The Controlling Effect of the Letter Marked Defendant's Exhibit "A".

The most helpful declaration of either Richfield or the bank as to what drafts secured the acceptances

is embodied in that letter (Defendant's Exhibit "A") to which reference has hereinbefore been made, written by Richfield Oil Company to appellant, and delivered, together with the drafts and letters of transmittal, by Hall to Gilstrap on the morning of October 8, 1930. This letter reads as follows:

"E. Leuenberger, Assistant Vice President,
Wells Fargo Bank & Union Trust Company,
Montgomery & Market Streets,
San Francisco, California.
Dear Sir:

We are sending by Mr. Hall, documents covering a shipment of Birla Brothers, Ltd., Calcutta, India.

Will you please release against this shipment $115,000 worth of acceptances made payable at ~~120~~ days sight.

90 R. L. H.

Very truly yours,
G. P. Lyons,
Comptroller."

(R. 316.)

At the trial of this action, counsel for appellee introduced a great number of exhibits consisting of almost every letter and document in any remote way concerning the transactions here in question which came into existence between October 8, 1930, and May 8, 1931. Yet, in all the careful and detailed marshalling of evidence so undertaken by counsel for appellee, there was no attempt to examine at the trial any of appellee's witnesses, Hall, Pope or McDuffie, or to cross-examine Gilstrap, Hellman or Leuenberger, or any other witnesses of appellant, with

respect to this particular letter. Of all of the letters which passed between appellant and Richfield Oil Company during this period of time, counsel for appellee scrupulously failed to introduce this one in evidence. In a case as well and as thoroughly presented as was appellee's, the answer is obvious; appellee's neglect of the document was not an error or oversight of diligent and able counsel, but an endeavor to forget, if possible, a vital weakness in the entire chain of argument. Mr. Pope testified on cross examination in explaining the reference in Exhibit "A" to the release of acceptances for $115,000.00 *against* the Birla Bros. *shipment* that "the documents covering a shipment to Birla Brothers" referred to the same documents described in the two letters of transmittal deposited with appellant on the same date. (R. 317.) The first of these letters (R. 266, 267) (marked Plaintiff's Exhibit 22 at the trial) stated in part as follows:

> "We are enclosing the following enumerated documents covering shipment going forward to Calcutta, India, per the M/S 'Silver Hazel'.
>
> Our draft #103004 amounting to $63,950, drawn at sight on Birla Brothers, Ltd.
>
> Our draft #103005 amounting to $63,950, drawn at 180 days sight on Birla Brothers, Ltd."

The other of these letters of transmittal (R. 268, 269) (marked Plaintiff's Exhibit 23 at the trial) contained the following list of enclosures:

> "Our draft #103006-A amounting to $55,900.76 drawn at sight on Birla Brothers, Ltd. at Calcutta.

> Our draft #103006-B amounting to $55,900.75 drawn at 180 days sight D/A on Birla Brothers, Ltd. at Calcutta."

In each case the "Shipment to Birla Brothers" was represented by one sight and one 180 day draft in equal amounts. Draft No. 103005 for $63,950.00, and draft No. 103006-B for $55,900.75, referred to in these two letters of transmittal, are the same two 180 day drafts in the total face amount of $119,850.76, whose proceeds constitute such a considerable part of the Judgment recovered by appellee in the trial Court.

Notwithstanding the conclusion of the witness Pope that the 180 day drafts were not to be security for acceptances, and that the first $115,000.00 worth of acceptances were issued only against the two sight drafts on Birla Bros., and notwithstanding the argument of counsel for appellee at the trial that only the sight drafts were taken as security for the acceptances, the record is clear and uncontradicted that Richfield Oil Company through Mr. Lyons, its Comptroller, to whom Hall had explained the transaction (R. 362), wrote this letter.

It confirms in a simple and decisive fashion that Richfield Oil Company completely understood that appellant was advancing funds *against all of the drafts* (i. e., against the shipment) which Richfield Oil Company at that time was depositing, including the 180 day drafts on Birla Bros.; that although the amount of the advances was much less than the amount of the drafts deposited, all of the drafts were to be held as security for the acceptances; and

that Richfield understood that when Mr. Lipman and Mr. Hellman told Mr. Hall that appellant would grant a line of credit against foreign drafts of Richfield, there was no distinction made to the effect that some drafts were to be security for the acceptances and others were not. Appellant submits that this letter, so scrupulously avoided by counsel for appellee at the trial, is an admission of Richfield Oil Company completely destructive of appellee's claim that the drafts in litigation were not deposited under and subject to the acceptance agreement.

Forced to avoid, if possible, the damaging effect of this letter, counsel for appellee argued that since Richfield was in financial stress, Lyons, the writer of the letter, was interested in obtaining the first $115,000.00 as quickly as possible, and that the letter was written by him with this object alone in view. It was further urged that since the details of the transaction had previously been agreed upon, the letter did not undertake to restate them or to modify the agreement. Counsel likewise contended that the letter was of the character which any one under like circumstances would have written, the writer never imagining that it would subsequently be characterized as illustrative of the agreement existing between the parties; it was also argued that Lyons, at the time of writing the letter, was ignorant of the transactions between the parties because all negotiations were conducted by Hall and Pope. The last contention is definitely refuted by the facts. It is undisputed that Hall, who supposedly knew all about that transaction, personally delivered the letter to Gilstrap, and that

in his own handwriting he changed the statement in the letter as to the maturity dates of the acceptances therein requested to be issued. His testimony is as follows:

> "I brought the letter, Defendant's Exhibit 'A'. The change in the maturity date of acceptances from 120 days to 90 days on this letter is in my handwriting."
>
> (R. 362.)

Hall, therefore, knew the contents of the letter, yet with the one exception just noted, he did not attempt to change it. The inference is compelling that the letter did not conflict with his understanding of the transaction.

Against the plain language of this letter, the other explanations of counsel likewise fail. The letter is clearly illustrative of the agreement between the parties. That Lyons ever at any time thought the agreement to be otherwise than that which appellant contends to be the case, or that he never imagined the letter would be used as illustrative of this contention, are mere assumptions unsupported by direct or inferential evidence, for Lyons was not called as a witness.

It is admitted that prior to the writing of this letter and the delivery thereof to the bank, the acceptance agreement had been presented to the bank, duly executed, and was in full force and effect. The first items transmitted subsequent to the execution of the agreement are the four Birla Bros. drafts, and the Richfield Oil Company has on its own stationery, by

its own officer and in its own language, requested appellant to "please release *against* this shipment $115,000 worth of acceptances." As the shipment was represented by the sight *and* 180 day drafts, the release of acceptances was *against them*. There can, therefore, we submit, be no dispute upon the fact, taken from the mouths of appellee's witnesses and from the language of Richfield Oil Company's letter, that both the sight drafts and the 180 day Birla Bros. drafts were security under the acceptance agreement.

It should be noted in passing that Mr. Lyons was the Comptroller or financial officer of Richfield Oil Company, one of those to whom Mr. Hall had to refer in making financial arrangements, and furthermore, that Mr. Hall testified as having reported to him the result of the San Francisco conference on his return to Los Angeles on the morning of October 7, 1930. (R. 362.)

(c) The Execution of the Acceptance Agreement Created a Revolving Credit.

The chief fallacy in the position taken by appellee and in the reasoning in the opinion of the lower Court and as a result of which the conclusion was reached that the first two 180 day drafts on Birla Bros. were not deposited under the acceptance agreements, is found in the narrow view taken by both the Court and appellee, that if these drafts secured any acceptances at all, such acceptances could only have been the first $115,000.00 worth issued by appellant at the time of the deposit of said drafts on October 8, 1930. Appellee then points out that since

it was necessary that Birla Bros. pay the sight drafts before they would be entitled to possession of the shipments, and since the proceeds of the sight drafts would be received in San Francisco many months before the maturity of the 180 day drafts with a resultant satisfaction of the $115,000.00 worth of acceptances, the 180 day drafts could by no possibility be security for said acceptances. Consequently it was argued that the deposit of the 180 day drafts as security for the acceptances mentioned could not have been within the contemplation of the parties. We were further cited in the trial Court to the fact that the last of the acceptances matured on February 26, 1931, while the proceeds of the 180 day Birla time drafts by their said terms, could not be realized upon until May, 1931. It is contended by appellee that the 180 day drafts could not therefore have been deposited as security for any of the acceptances because of their maturity at a time, as appellee contends, when the acceptance agreement was no longer in force. This narrow view is strongly illustrative of the manner in which appellee has built up his case from a retrospective standpoint rather than from a prospective view of the transaction as of the time when the negotiations for and the execution and delivery of the acceptance agreement took place.

On the other hand appellant's contention is that the acceptance agreement was intended as a continuing one until either party called a halt; that Richfield and the bank both understood that said agreement created a revolving or "line" of credit to the extent of $155,000.00; that Richfield's loan limit on accep-

tances was $155,000.00 outstanding at any one time; and that when the limit was reached no more acceptances would be issued until payment of any of the outstanding acceptances made part of the credit again available.

At the time of the delivery of the first acceptance agreement on October 6, 1930, Richfield Oil Company and appellant contemplated, not one transaction, but a continuous deposit of drafts and issuance of acceptances during an indefinite period of time, the limits of which were then unknown but, as far as could then be ascertained, might well be for one, two or several years. Thus a credit, or "line of credit" was established and the acceptance agreement executed containing the limitation in the amount of the credit agreed upon but no time limit within which the transactions were to be carried on.

With a continuous series of deposits of drafts and issuances of acceptances under one agreement contemplated by the parties to extend over a period of time, probably far beyond the date of the maturity of the 180 day drafts, the supposed impossibility of using these drafts as security for acceptances becomes non-existent. On the contrary, the 180 day drafts on Birla Bros. stood as effective and useful security for any acceptances or other obligations permitted or provided for by the acceptance agreement.

This same argument holds for the drafts deposited after November 28, 1930, the date when the last acceptance was issued, including the third draft on Birla Bros. in the sum of $23,532.08, and that on Ricardo

Velazquez in the sum of $1,245.11; they likewise were deposited under and subject to the acceptance agreement and were security for existing or future obligations provided for therein.

Each of the acceptance agreements is blank as to the drafts and securities which were to be deposited thereunder. Parol evidence was therefore admissible to prove what drafts were so deposited. There is no dispute with regard to this. The very existence of these blanks, however, is mute evidence of the soundness of appellant's contention that a revolving credit was intended, for such an arrangement caused it to be impracticable and impossible to list the drafts deposited or to be deposited under the acceptance agreement. The testimony of Gilstrap, corroborated by that of Pope, explains this and leaves no room for doubt that a definite purpose lay behind the failure of the parties to fill in the blanks in this agreement. At the time of the delivery of the agreement the blanks were considered. Mr. Gilstrap's testimony in this connection and with respect to the existence of a revolving credit is as follows:

> "I told him that the acceptance credit which we had granted Richfield was a continuous one, that is, a revolving one, which might be availed of by them to an extent not exceeding $150,000 in acceptances outstanding at any one time; that the acceptance agreement which he had given us was intended to cover any acceptances which might later be executed by us, within a limit of $150,000 outstanding at any one time; that the acceptance agreement did not stipulate the exact amount of acceptances, that is the exact

amount for which each acceptance was drawn, because we did not know nor did they know nor did any one know in what amount the acceptances would be issued and when they would be issued. That would be dependent upon the collections which later would be forwarded to us. Likewise, no mention could be made, as I told Mr. Pope, of the collections which were the security for this particular credit, because for the same reason neither they nor we knew exactly what collections would later be sent us. Rather than have them have to execute a new acceptance agreement each time that a new acceptance was asked for or each time that they sent us a new collection, I explained to Mr. Pope that this one agreement was expected to be a blanket one."

(R. 371, 372.)

Mr. Pope's testimony in this respect is as follows:

"The first time I saw this acceptance agreement, Plaintiff's Exhibit 16, was a few days before we came up to San Francisco. I did not discuss its contents with any one. I did not make any inquiry as to why there were blanks in the agreement. I believe that subject came up during our conversation with Mr. Gilstrap. To the best of my memory I believe something of this nature was said by Mr. Gilstrap: 'As you will be depositing acceptances from time to time under this arrangement and drafts under this arrangement, all of which you cannot identify now, it is impossible to fill in those blanks at the present time'. We could not give by number and reference on October 6th or 7th drafts that we would deposit on October 10th or 12th. But none the less it

might be that drafts of October 10th or 12th were intended to apply under the agreement."

(R. 313.)

The weakness of Pope's conclusions regarding the non-existence of a revolving credit is apparent in the following excerpt from his testimony:

"It is my understanding that after we had issued the initial $150,000 of bank acceptances which we brought up it would be necessary to make out a new acceptance agreement. I cannot remember any one telling me that. I was not familiar with these transactions to any extent before I came to the bank in the early part of October and the whole thing was strange to me."

(R. 313.)

As has been pointed out previously in connection with the testimony of Hellman and Gilstrap relative to the inception of Richfield's loan on its foreign collections, the negotiations all concerned the establishment of a *line* of credit. Mr. Hellman, in testifying as to the conference between Mr. Lipman and Mr. Hall, said:

"Then the question came up of the amount of credit. I believe Mr. Lipman said to Mr. Hall, 'We will advance you $150,000, $200,000, $250,000, on your foreign collections'. He said to Mr. Hall that this credit was to remain in force until it was cancelled by either side; that we did not know whether it would work out or not; we did not know what kind of foreign collections they were handling, and if it did not work out we reserved the right to cancel the credit."

(R. 438.)

Mr. Hall himself corroborated this:

> "Mr. Lipman stated that he had accommodated Richfield to a large extent and also had accommodated Mr. Talbot, and he would give a further *line of credit based on foreign drafts in the amount of $150,000 or thereabouts and see how it would work out.*"
>
> (R. 343.)

The foregoing establishes the understanding on the part of all concerned that a credit to the extent of the amount specified was granted to run over a considerable period of time and that there was no necessity for executing a new acceptance agreement each time a fresh advance should be made over and above the original $150,000.00 as long as not more than that amount was outstanding under the agreement at any one time. The acceptance agreement itself is in its terms entirely consistent with and supports this understanding.

That appellant recognized that the acceptance agreement created a revolving credit is quite apparent from the ledger page which was produced by it at the trial at the instance and request of counsel for appellee and introduced in evidence by the latter as Plaintiff's Exhibit 122. (R. 394, 395, 396.) This record leaves no doubt as to the parties' understanding of the transaction; the figures thereon conclusively show that when an acceptance was paid and the credit under the acceptance agreement was received, the amount of the payment was entered on the ledger sheet as being thereupon again available to Richfield,

without the necessity of issuing a new acceptance agreement. The details with respect to this are well set forth on the exhibit itself and in Mr. Gilstrap's testimony. (R. 396, 397, 398.)

That Richfield understood that it was granted a revolving credit by appellant is illustrated in the testimony of Mr. Hall:

> "The only time that a continuous credit was mentioned was I believe by Mr. Gilstrap at first. He said that it could be handled on an acceptance or form a revolving or continuous credit."
>
> (R. 359.)

Counsel for appellee argued at the trial that since the existence of a revolving credit was not pleaded by appellant in its answer, it was not properly within the issues of the case. But appellant actually had no opportunity to raise the issue before the trial; appelland pleaded in its answer that there was only one agreement between the parties, to-wit, the acceptance agreement. (R. 105, 115.) This allegation is nowise inconsistent with the contention that a revolving credit was created, for it was the acceptance agreement itself which produced the revolving credit.

Appellee further argued that the failure of appellant to call to the attention of Richfield, after the payment of the Birla Bros. sight drafts on December 15, 1930, that it had the right to obtain additional moneys under the acceptance agreement, is indicative that no continuing credit existed. However, the acceptance being a ninety day obligation of both Richfield and the bank, until it was actually paid the obligation

thereon still existed, notwithstanding any anticipated payments prior to maturity. The earliest time when Richfield Oil Company had the right under the acceptance agreement to further credit was upon the actual payment of the acceptances for $115,000.00 on January 6, 1931. Appellee then contended that the fact that Richfield asked for no additional advances after the final satisfaction of the first $115,000.00 worth of acceptances proves that no continuous credit existed. Richfield's failure to request further advances is not evidence of the non-existence of the credit; the reason for this failure is something which lies within the bosom of Richfield itself. However, appellant may safely guess that Richfield was then precariously close to a receivership and the company probably was not bothering at that time about securing the financing of its Foreign Department. The acceptances were paid on January 6th, less than ten days before the appointment of the receiver. On the other hand, between the 21st day of October, 1930, and the 28th day of November, 1930, the record shows that Richfield did not request the issuance of acceptances although it was still entitled to $20,000.00 worth under the acceptance agreement. Thus the mere lapse of time during which no additional advances were requested is meaningless in so far as its bearing upon the existence of a revolving credit is concerned. Appellant was not obligated to call to the attention of Richfield that it had the right to further credit upon the payment of the first $115,000.00 worth of acceptances, because appellant had from time to time advised it of the maturity date of acceptances and

of the actual payment thereof. (R. 295, 296, 297, 298, 299, 300, 303, 304.)

The creation of a *line* of credit, as testified to by all witnesses; the manner of the Richfield borrowing, namely, under the original credit, but in several installments; the right to cancel demanded by Mr. Lipman (R. 438), and in substance admitted by Mr. Hall (R. 343); and the records of the bank (R. 394, 395, 396), all bespeak the existence of this revolving, or continuous credit. Opposed to this is substantially nothing, except Richfield's neglect from January 6th to January 15th to borrow further under the credit.

But even though no revolving credit was ever created or contemplated, all of the drafts in question were nevertheless deposited as security for acceptances. Here again appellee's case has apparently been constructed on a retrospective view of the facts as they actually happened rather than on the understanding of the parties as of the time of the execution of the acceptance agreement and the deposit of the drafts. It so happened that all of the acceptances were issued within a comparatively short period of time. Since they were to mature at the expiration of ninety days from the date thereof, the 180 day drafts necessarily turned out actually to be unavailable as security for acceptances. This, however, is no proof that they were never deposited as such security. At the time the first Birla Bros. drafts were forwarded to appellant it had no means of knowing when Richfield would avail itself of the balance of the $150,000.00 credit. This might just as well have been at such a later time

that the maturity dates of the acceptances would have been extended beyond the maturity date of the 180 day drafts, in which event they actually would have been of value as security.

Furthermore, just because the acceptances were actually paid as they matured from the proceeds of drafts is not evidence that appellant had any guaranty at the inception of these transactions that such would be the case. Conceivably a great number of the drawees of the drafts might default, failing to pay entirely, or delaying payment for such a period of time that the acceptances would still be unsatisfied at the maturity of the 180 day drafts. In any such event, these drafts would have had actual value as security. These probabilities were sufficient to necessitate the deposit of all drafts as security for all acceptances, and they completely explain the statement of Mr. Lipman to Mr. Hall (hereinbefore quoted) that appellant would be willing to advance money *on Richfield's foreign drafts.*

It is submitted that the foregoing arguments demonstrate that a real and substantial reason existed for the deposit and acceptance of *all* the drafts in question as security for *all* the acceptances, thus completely answering appellee's contention based upon the supposed uselessness of the drafts as security. In many loan transactions, collateral deposited as security turns out to be useless, and yet the fact of the deposit thereof as security cannot thereby be denied.

(d) All Drafts Deposited Were Transmitted, Received and Handled Alike.

The manner in which the acceptance agreement was signed and delivered and the first drafts deposited has been related.

The sight drafts *and* 180 day drafts were deposited and handled in exactly the same manner. A letter of transmittal accompanied each set of drafts covering each shipment. Each of these letters was written in substantially the same language and appellant issued to Richfield receipts for all drafts delivered. (R. 319.)

Starting with the first Birla Bros. transactions on October 8th, Richfield proceeded to send to appellant its drafts with transmittal letters, all in exactly the same form as those first letters, Plaintiff's Exhibits 22 and 23 (R. 266, 267, 268, 269), receiving from appellant in each instance identical deposit receipts for the drafts. The first of these receipts is Plaintiff's Exhibit 24 (R. 271) and refers not alone to the four Birla Bros. drafts, but to the two additional drafts deposited by letters of transmittal of October 8th and 9th. (R. 274, 275, 276, 277.)

The transactions continued, in a manner *exactly* like that relating to the first Birla Bros. drafts, up to the time of the appointment of appellee as receiver. Copies of the letters of transmittal and original deposit receipts relating to these transactions are in evidence included in Plaintiff's Exhibit 40 to 92. (R. 291, 292, 293.) All are identical in form except as to the description of the drafts and shipping documents. Mr. Gilstrap testified (R. 383) and Mr. Pope

admitted (R. 319) that all of the transactions with respect to the forwarding of the drafts to appellant and the receipt thereof by it were handled in exactly the same manner as inaugurated initially with respect to the first four Birla Bros. drafts.

Although appellee claims that some of the drafts were deposited as security for acceptances and some were not, there is nothing in any of the letters of transmittal or the receipts, or in fact in any other contemporaneous document, which indicates such a distinction. All of the drafts undisputedly were transmitted and handled alike, including those here in question.

Finding of Fact No. VII (R. 183, 184) is to the effect that an oral agreement was entered into in August, 1930, by which certain drafts, without in any manner specifying them, were to be deposited for collection only. In other words, they were not to be deposited as security for acceptances. Finding No. VIII (R. 184, 185) is that thereafter the 180 day Birla drafts in question were delivered pursuant to this agreement. In Finding No. XII (R. 184, 185) the Court held that in October, 1930, another agreement, the acceptance agreement, was entered into. And in Finding No. XVI (R. 189) the trial Court found that the Birla Bros. sight drafts were deposited pursuant to such latter agreement. There is not one scintilla of evidence supporting this arbitrary separation of agreements. The fact of the matter is that the two Birla sight drafts and the two 180 day drafts were delivered at the same time, October 8, 1930,

under exactly the same circumstances, and with no distinction, then or thereafter, as to the manner in which they or any other drafts would be handled.

Contrary to the Court's findings, no distinction was ever made or intended to be made; all of the drafts were deposited as security for acceptances; and all were under and part of the transaction which commenced with the delivery of the acceptance agreement on October 6, 1930.

(e) The Manner in Which the Proceeds of the Various Drafts Were Applied to the Payment of Acceptances Refutes Appellee's Contention as to the Distinction Between Drafts.

It is a fact developed upon cross examination of Mr. Pope that the proceeds of certain drafts which supposedly were not deposited under the acceptances were actually applied in payment of acceptances. It is further an accepted fact, developed likewise upon the cross examination of Mr. Pope, that even the proceeds of drafts alleged to have been deposited as security for acceptances and which were paid on acceptances, were not applied against the particular acceptances supposedly issued thereon. (R. 301, 323, 324, 325.)

It is here advisable to refer to the schedule of drafts set out in the Narrative Statement of Evidence (R. 293) and to point out more minutely just which drafts besides those which are here involved were, and which were not, according to the claim of appellee, deposited under the acceptance agreement.

The first of these was draft No. 103024, deposited on October 28, 1931. The goods under

this draft were not shipped and the draft was returned to Richfield.

Draft No. 103025 was deposited on October 28, 1930, no acceptances having been issued at that time. This draft was paid on November 15, 1930, prior to the release on November 28, 1930, of the final series of acceptances in the total sum of $25,000.00.

The history of draft No. 103028 was similar to that of No. 103024, the first to be considered hereinabove.

Appellee claims that drafts Nos. 103027, 113008, 113009 and 113018 fall without the scope of the acceptance agreements because it was estimated, as appellee claims, that due to the length of time which would be required to send the drafts to the foreign country in which the drawee resided, plus the time required to return the proceeds, funds would not be received in San Francisco prior to February 26, 1931, the maturity date of the last acceptance issued in the sum of $25,000. This is an assumption unfounded by any evidence of communications, oral or written, passing between Richfield and appellant. If any such process of reasoning ever took place prior to the time at which this controversy arose, it remained locked in the minds of Mr. Hall and Mr. Pope.

As to drafts Nos. 113021, 113023, 123007, 123008, 123009, 123010, 123013, 123014, 123015, 13103 and 13106, appellee claims that because they were deposited subsequent to the issuance

of the last acceptance and because the amount of drafts which were undisputedly under the acceptance agreements exceeded the amount of the acceptances outstanding, these drafts were not deposited as security for acceptances.

(1) Application of Proceeds.

The manner in which the proceeds of some of these drafts were handled is inconsistent with appellee's contention.

The proceeds of draft No. 113023 were actually applied by appellant, apparently with Richfield's concurrence, to the satisfaction of the last maturing acceptance in the sum of $25,000.00. (R. 229,300.) This was also true of drafts Nos. 123007 (R. 300), 113018 (R. 303,304), 123009 (R. 303,304), and 113009 (R. 303,304).

It is submitted that this treatment of the proceeds of these drafts decisively supports appellant's contention that all of the drafts were deposited as security for acceptances. The acts of the parties bespeak their understanding of the transaction.

(2) So-Called "Draft Reserve".

Elaborate care was taken by counsel for appellee in the course of the trial to present in as effective a manner as possible that part of the correspondence which passed between Wells Fargo Bank & Union Trust Co. and Richfield Oil Company relating to the issuance of acceptances and the existence of a so-called "Draft Reserve." (R. 278,279.) An examination of the transaction as stated by Mr. Gilstrap and

Mr. Leuenberger in behalf of appellant, and as admitted in substance by Mr. Pope, readily explains the machinery under which the drafts were to be issued. The limit of the credit fixed by Mr. Lipman and Mr. Hellman was $150,000.00 (subsequently extended by the sum of $5000.00 at the time of the execution of the second acceptance agreement). Within this total limit of $155,000.00, as testified repeatedly by Mr. Gilstrap and by Mr. Leuenberger, appellant would and did advance moneys to the extent that there was satisfactory security in the form of drafts. Thus, for example, appellant would not issue acceptances for more than one-half of the shipment against Birla Bros. (that is, the sight drafts), and would not take as a "basis" (in the numerous admissions of Pope) or as a measure, as the testimony of Hall and Leuenberger sets forth, the 180 day drafts upon Birla Bros. In determining whether Richfield could have additional acceptances issued within the $155,000.00 limit, it was from time to time essential to examine the drafts then on deposit and to decide whether the security therefor was satisfactory, *measured* by or *based* upon these drafts, but with all of the drafts as *security;* if it was, the acceptances were then accepted by the bank and sold. In this connection it is important to note that the words "draft reserve" first came into these transactions as a result of letters written by Pope himself, admittedly a novice in dealings of this kind. Gilstrap testified (R. 384) that he adopted Pope's language. Thereafter "draft reserve" appeared several times in the correspondence.

(3) So-Called "Earmarked" Drafts.

Appellee also placed great reliance at the trial on the statement in a letter written by appellant to Richfield, dated October 21, 1930 (R. 282) to the effect that appellant had "earmarked" draft No. 103010 against the acceptance in the sum of $10,000.00 maturing on January 19, 1931. Appellee reasons from this that each draft was tied to a particular acceptance and was security for no other acceptance.

The letter from appellant to Richfield, dated January 3, 1931, marked Plaintiff's Exhibit 95 (R. 296) sets forth the manner in which the proceeds of this draft No. 103010 were finally applied. The letter shows that the first $115,000.00 worth of acceptances matured on January 6, 1931, the second acceptance for $5000.00 on January 13, 1931, and the third acceptance for $10,000.00, against which draft No. 103010 was supposed to have been "earmarked," on January 19, 1931. At the time this letter was written the only proceeds of drafts which appellant had on hand were those of the first two Birla Bros. sight drafts and those of draft No. 103010. After the satisfaction of the $115,000.00 worth of acceptances, the sum of $4626.05 remained of the proceeds of the two Birla Bros. drafts. Since this was not enough to satisfy the $5000.00 acceptance maturing on January 13, 1931, it became necessary to use part of the proceeds of the so-called "earmarked" draft for this purpose. Furthermore, after complete satisfaction of the $10,000.00 acceptance against which this draft was alleged to have been earmarked, some $600.00 remained to be applied on the final $25,000.00 worth

of acceptances. This same letter of January 3, 1931, shows clearly that the proceeds of the two Birla Bros. drafts and of the so-called earmarked draft were indiscriminately applied to the satisfaction of the three sets of drafts totalling $130,000.00, instead of being confined to the particular acceptances for which appellee contends they were "earmarked". In this indiscriminate application Richfield concurred. Despite the vehement assertion of appellee at the trial that draft No. 103010 was earmarked against the $10,000.00 acceptance maturing on January 19, 1931, and was security solely for this acceptance, there is no evidence that Richfield at any time demanded that appellant turn over to it the balance of $991.07 of the proceeds over and above the amount of the acceptance. Richfield would certainly have been entitled to the payment to it of this surplus if the present claim of appellee had been the understanding of the parties. The manner in which the proceeds of this draft were applied, on the other hand, demonstrates again that all of the drafts deposited were security for each and every acceptance issued.

(f) Comparison of the Records Kept by the Parties to the Transaction.

Appellee has contended that Richfield Oil Co. understood the transaction as involving the deposit of only certain specified drafts under the Acceptance Agreement. Appellant, on the other hand, contends that there was but one transaction and that all the drafts were deposited under the acceptance agreements as security for acceptances. Assuming that both appellee and appellant are honest in their respective conten-

tions, it is particularly important to compare the records kept by the Richfield Oil Company and those of appellant during the course of the transaction. There was neither offered nor introduced in evidence a single original record, book or document of Richfield Oil Company showing that during the operation of the acceptance agreement and the forwarding of the drafts, or, indeed, at any time, a distinction was made between the drafts with respect to their relationship to the acceptances and the acceptance agreement.

As to the Richfield Oil Company's records, Mr. Pope testified that he kept "little pencil memorandums" showing what particular drafts were, according to his understanding, under the acceptances. (R. 305.) This is the sole evidence as to any records kept by Richfield Oil Company with respect to the drafts allegedly under the acceptance agreement or security for the acceptances. There was no evidence introduced as to where or how or when these "little pencil memorandums" were kept, nor were they produced at the trial. The record is clear that there was no communication from Richfield to appellant of the pencil memoranda or of any other records or list of drafts purportedly under the acceptance agreement. On the other hand, the communications which Richfield directed to appellant consisted of letters of transmittal accompanying the drafts, each in exactly the same form and couched in the same language as the letters marked Plaintiff's Exhibits 22 and 23 (R. 266, 267, 268, 269), which started the transaction.

As opposed to the doubtfully effective "little pencil memorandums" of Richfield Oil Company are the

permanent records of appellant. Mr. Gilstrap, corroborated by the witness Mr. Desmond, a clerk in the Foreign Department of appellant, testified that the permanent record of each draft deposited with and transmitted by it to its foreign correspondent for collection, consisted of a copy of the remittance letter addressed to the correspondent bank, containing a detailed description of the draft and accompanying documents. (R. 377, 378, 379.) There was offered, and received in evidence four such transmittal letters, marked at the trial Defendant's Exhibits "F," "G," "H" and "I" (R. 380, 381, 382), relating respectively to draft No. 103006-A (sight draft on Birla Bros. for $55,900.76), draft No. 103006-B (180 day draft on Birla Bros. for $55,900.75), draft No. 103004 (sight draft on Birla Bros. for $63,950), and draft No. 103005 (180 day draft on Birla Bros. for $63,950). These first four letters of transmittal from appellant to its Calcutta correspondent relate to the first four Birla Bros. drafts, including the two 180 day drafts, the proceeds of which constitute the principal part of the sum in issue in this litigation. In the right hand corner of each of the four carbon copies of letters of transmittal, which as previously stated, constitute appellant's permanent records of the transaction, there were written in pencil the words "Security for acceptances, proceeds to Clemo." The testimony of Gilstrap, supported by Desmond, is clear to the effect that these copies of letters of transmittal were regular records of appellant; that they were the first permanent records, and were kept in the ordinary course of business. Gilstrap further testified, both

on direct and on cross examination, that in order to start the new transaction in the proper manner he instructed the clerk, Desmond, to make the notation in question upon the first few file copies of the letters of transmittal relating to Richfield drafts (Gilstrap's testimony, R. 378, 379; Desmond's testimony, R. 423, 424). Gilstrap testified that:

> "This was the first transaction we had had with Richfield, and I wanted to be sure there could be no mistake made about these bills being security for acceptances, and as an initial transaction we wanted to be sure to start it correctly."
> (R. 380.)

Subsequently he said:

> "When I handed the first four Birla Bros. drafts to the clerk in charge of the foreign collections, who is Mr. Desmond, I told him we were advancing the Richfield Oil Company against the collections certain amounts by means of acceptances, and that I wanted him to be sure to make a proper memorandum so that the proceeds of these collections, when they were received, would be handed to Mr. Clemo, the man who handled the acceptance finances."
> (R. 415.)

Mr. Desmond testified, despite arduous efforts of counsel to break him down, that the writing was his and was made contemporaneously with the receipt of the drafts and instructions from Mr. Gilstrap. (R. 423, 424.) Thus the file copies of all of the first letters of transmittal relating to Richfield drafts which went from appellant to its correspondents had the same

pencil notation upon them. After the transaction was well under way, the same notation no longer appeared upon file copies.

In the course of the trial, Counsel for appellee demanded of Mr. Gilstrap that he produce all the records of appellant relating to the acceptance transaction with Richfield Oil Company. In response to this, Mr. Gilstrap produced a ledger sheet which appellee offered in evidence and which was received and designated as Plaintiff's Exhibit 122. (R. 394, 395, 396.) An examination of this ledger page discloses that after the entry of the original advance of $115,000.00 on October 6, 1930, the first entries in the column entitled "documents drawn against", are "Silver Ray" and 17,400 cases of kerosene and 540 drums of fuel oil. Next thereafter is the name "Silver Hazel" and 95,000 cases of kerosene. (R. 394.) In explaining these entries, Mr. Gilstrap testified that "Silver Hazel" and "Silver Ray" referred to the names of the two boats carrying the Birla Bros. shipments (R. 396, 412), and that the reference to kerosene and fuel oil was a description of the shipments which went forward thereon (R. 412); furthermore, that these were the shipments to Birla Bros. represented respectively by the two sets of drafts,—two at sight and two at 180 days, drawn by Richfield Oil Company upon Birla Bros. (R. 412.) An examination of Plaintiff's Exhibits 22 and 23 (R. 266, 267, 268, 269), being the letters of transmittal with reference to the first Birla Bros. drafts, will immediately disclose that "Silver Ray" and "Silver Hazel" were the two boats upon which the shipments went forward.

According to its own records, duly identified and established, it is apparent that appellant complied with the instructions contained in the previously mentioned letter of Mr. Lyons, Comptroller of Richfield Oil Company (R. 316) to issue $115,000.00 worth of acceptances *against* the entire shipment to Birla Bros. evidenced by the four drafts, two at sight and two at 180 days. This is verified not only by Exhibit 122, but also by the notations upon the filed copies of appellant's letters of transmittal hereinbefore referred to. (Defendant's Exhibits "F", "G", "H", and "I".)

In view of the clear and convincing records of appellant, consistent with the testimony of its officers and employees, and in view of the uncertain and nebulous records, if any, of Richfield, no doubt remains as to the nature and operation of the acceptance credit. *There was only one transaction inaugurated by and under the acceptance agreement—all drafts transmitted to appellant by Richfield Oil Company were deposited under the agreement as security for the acceptances; being thus deposited, they became, by operation of the terms of the agreement, security for the general indebtedness of Richfield to appellant.*

(g) The Legal Effect of the Terms of the Acceptance Agreement.

If appellant is correct in its foregoing contentions that all of the drafts, and particularly those whose proceeds are involved in this litigation, were deposited under and pursuant to the acceptance agreement, then the provision of the acceptance agreement hereinbefore set forth that

> "all bills of lading * * * money and goods held by you as security for any such acceptance shall also be held by you as security for any other liability from us to you * * *"

clearly gave appellant the right to apply the proceeds of the drafts to the satisfaction of the general indebtedness of Richfield to appellant in the sum of $625,000.00. It is well settled that such a provision as this gives the security holder the right to apply the security to all indebtedness due from the mortgagor or pledgor, taking the case out of the rule stated in *Berry v. Bank of Bakersfield* (1918) 177 Cal. 206, 170 Pac. 415, that a bank has no general lien upon collateral pledged to secure only a specific debt.

In *Commerce & Savings Bank v. Robert H. Jenks Lumber Co.* (1911) 194 Fed. 732, a note executed by the defendant in favor of the plaintiff bank contained a provision as follows:

> "The undersigned, having herewith deposited as collateral security for the payment of this and every other liability of the undersigned to said bank, direct or contingent, due or to become due, or which may hereafter be contracted or existing * * *"

The Court said at page 735:

> "Considering the fact that this lumber company was a large borrower of the bank, and considering this plain and precise language, which could not be any plainer, there seems but little doubt but that the Union National Bank has a right

> to hold these 304 shares of capital stock * * * as collateral not only for the $20,000 set forth in the specific note above referred to, but also for the indebtedness of every kind of the Robert H. Jenks Lumber Co. to the bank. Language not as comprehensive nor as specific as that employed in this note in question has been held by several of the highest courts of the state to mean that the collateral was not given for the specific indebtedness of the note alone, but for all of the indebtedness."

In *Citizens Bank v. Thornton* (1909) 174 Fed. 752, the provisions in a note given to the bank stated that the collateral pledged therewith was

> "* * * to secure the payment of this or any other obligation upon which the owner shall be in any way bound primarily or secondarily, due or to become due."

The Court said, at page 762:

> "Apter language could not be used to convey the intent to pledge the collateral for the protection of 'any other debt' the pledgor might contract thereafter. The original Buckmaster and Williams note, which the parties recognized as one of the debts for which appellee was liable, was outstanding at the time the deposit of collateral was made. By its express terms the pledge secured 'any other debt due or to become due' * * * We cannot doubt that the collateral in the hands of the receiver is subject under the terms of the pledge to the satisfaction of the principal and interest due upon the Buckmaster and Williams note in suit."

To the same effect see:

Foster v. Abrahams (1925) 74 Cal. App. 521, 241 Pac. 274;

Selma Bridge Co. v. Harris (1898 Ala.) 31 So. 508;

Boni & Harper Milling Co. v. Stevenson Co. (1913 N. C.) 77 S. E. 676;

Bank v. de Mere (1894 Ga.) 19 S. E. 38;

Beacon Trust Co. v. Robbins (1899 Mass.) 53 N. E. 868;

Stanley v. Bank (1896 Ill.) 46 N. E. 273.

(h) The Terms of the Acceptance Agreement With Respect to Security Cannot be Altered by Parol Evidence.

Since the drafts in question were, as appellant claims, deposited under the acceptance agreement, parol evidence to the effect that they were to be security for a particular indebtedness only is inadmissible.

In *National Bank of Rochester v. Erion-Haines Realty Co.* (1928) 232 N. Y. S. 57, a mortgage provided that it was a continuing and collateral security for the payment of any and all indebtedness of the mortgagors to the bank, then existing or at any time thereafter arising by reason of the notes, drafts, or other obligations of the mortgagors. Defendants claimed, in the same manner as appellee in the case at bar, that it was orally agreed that the bond and mortgage should be and remain not general collateral according to its terms, but security for the note in suit only. The Court said, at page 59:

> "The bond and mortgage in suit are broad and general in their terms as against their makers. * * * Even if the proof introduced by defendants is sufficient to establish the claimed oral agreement preceding or attending the making and delivery of the bond and mortgage in February, 1914—to the effect that the instruments in question in the possession of the Bank of Commerce were held as collateral to the note in suit and its predecessors and to no other notes or indebtedness —receipt of such proof in evidence was error in that it tended to vary the terms of a written instrument contemporaneously or subsequently executed."

In *First National Bank of Langdon v. Prior* (1901 N. D.) 86 N. W. 362, it was held that a prior or contemporaneous oral agreement made by a mortgagee or his agent that upon payment of two notes the mortgage would be released, is not admissible in evidence where the mortgage provided absolutely that it should be security for four notes.

The two foregoing cases have been cited merely to show the precise application of the general parol evidence rule to the particular facts of the case at bar.

(i) Appellee Must Bear the Burden of Proving That the Drafts in Question Were Not Deposited Under the Acceptance Agreements.

At the trial of this action, counsel for appellee attempted to impose upon appellant the burden of proving that the 180 day drafts drawn on Birla Bros. were deposited with appellant under the acceptance

agreements. They contended in substance that if no evidence were introduced on either side on this point, appellee would have been entitled to a finding that these drafts were not deposited under the acceptance agreements. This conclusion is entirely unwarranted and erroneous. It is elementary that the burden of proving a fact rests upon one who has the affirmative of the issue.

In paragraph VII of appellee's ancillary amended bill of complaint (R. 74, 75) an allegation is set forth to the effect that the 180 day drafts were deposited with appellant under an agreement entered into in August, 1930. Contained in paragraph VIII (R. 77, 78, 79) of said amended bill is an allegation that other drafts were deposited under an acceptance agreement entered into in October. Thus, appellee alleged the existence of two separate contracts.

In paragraph V of its answer (R. 104, 105) appellant denies that there was any such agreement as set forth in paragraph VII of the amended bill, and "with respect to the agreement under which said drafts were deposited", appellant averred that the only agreement was one entitled "Acceptance Agreement". In paragraph VI of appellant's answer (R. 105, 106, 107, 108) it denied that any agreement was made with Richfield Oil Company of California with respect to said drafts except said acceptance agreement. Thus, appellant denied negatively the existence of two agreements as alleged by appellee and further denied affirmatively the existence of such two agreements by alleging that there was only one agreement.

That the burden rests upon one having the affirmative of the issue and that the pleading of an affirmative denial does not shift the burden was held in

Scott v. Wood (1889) 81 Cal. 398, 22 Pac. 871.

In that case the plaintiff brought an action to recover for services rendered under a contract in which, as alleged, defendant agreed to pay $250.00 per month. The answer averred that subsequent to the time when the contract was entered into, it was agreed that the salary of plaintiff should be $200.00 per month. The Court held that the burden of proof rested on the plaintiff, saying at page 400:

> "The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence. * * * The two burdens are distinct things. One may shift back and forth with the ebb and flow of testimony. *The other remains with the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue.*" (Italics ours.)

In the same case, at page 404, the Court said:

> "But we treat the complaint as sufficiently alleging that the rate did, in fact, continue as it commenced. This essential allegation was put in issue by the answer. It averred affirmatively a different agreement made shortly after the one stated in the complaint and denied that there was any subsequent agreement. This was sufficient to raise an issue as to the continuance of the rate alleged. *The fact that the traverse was affirmative*

and not purely negative in form would not destroy its force nor change its essential nature." (Italics ours.)

In *Gilman v. Bortz* (1883) 63 Cal. 120, the *per curiam* opinion sufficiently states the facts and the decision as follows:

"The court below must have denied the motion for a nonsuit on the ground that the answer failed to deny the allegations of the complaint, except as to the assignment to the plaintiff. In so construing the answer the court misconceived its meaning. The answer denied that the sale was for $800 in Gold Coin, as alleged in the complaint, and then proceeded to aver that the contract of sale was for $400 in money, and for $400 in boarding the plaintiff. This was in legal effect to deny that the sale was for $800 or on any other terms than as set forth in the subsequent averments of the answer above stated. When, then, the plaintiff only offered the assignment to him and rested, he had offered no evidence to establish the main allegation of his complaint, and the nonsuit should have been granted."

In *Murphy v. Napa County* (1862) 20 Cal. 497, plaintiff sued to recover a certain sum for work done and materials furnished in repairing a bridge. The answer denied the making of the contract with plaintiff and averred that a certain other contract was the only one between the parties. The Court said, at page 503:

"The complaint must be understood as averring a contract in accordance with the statute, and we think the answer sufficiently denies the making

> of such a contract. It is awkwardly drawn, and lacks in many respects the perspicuity and precision desirable in the pleading; but it denies in a plain and unequivocal form the making of any contract with the plaintiff. It admits a contract with the plaintiff and one Williston, and avers that this was the only contract made by the defendant in relation to the matter, and denies that the board of supervisors made any other. *This was sufficient to put plaintiff upon proof of the contract, and the evidence in the case did not entitle him to recover.*" (Italics ours.)

To the effect that the burden of proof rests upon the party who has the affirmative of the issue, see:

Koyer v. Wellman (1909) 12 Cal. App. 87, 106 Pac. 599;

Ruth v. Krone (1909) 10 Cal. App. 770, 103 Pac. 960;

Valente v. Sierra Ry. Co. (1907) 151 Cal. 534, 91 Pac. 481.

As a result therefore of the holdings of these cases, the burden here rests upon appellee to prove the existence of the two contracts alleged, and if he fails to do so by a preponderance of the evidence, appellant is entitled to a finding that the drafts were all deposited under the acceptance agreement. It is submitted that in the light of all the evidence adduced at the trial, as set forth in the Narrative Statement of Evidence and as summarized herein, appellee has failed to prove by a preponderance of evidence the existence of the two contracts alleged and has failed to prove that the drafts involved herein were not deposited under the acceptance agreement.

At the trial, appellee relied upon the case, of *Roche v. Baldwin* (1904) 143 Cal. 186, 76 Pac. 956; *Cusick v. Boyne* (1905) 1 Cal. App. 643, 82 Pac. 985; *Melone v. Ruffino* (1900) 129 Cal. 514, 518, 62 Pac. 93; *Gerald v. Irvine* (1929) 97 Cal. App. 377, 275 Pac. 840, *De Laval Dairy Supply Co. v. Stedman* (1907) 96 Cal. App. 651, 92 Pac. 877; *Gett v. Pacific Gas & Electric Co.* (1923) 192 Cal. 621, 623, 221 Pac. 376; *O'Neill v. Caledonia Ins. Co.* (1913) 166 Cal. 310, 135 Pac. 1121, as showing that the burden of proof rested upon appellant. These cases, however, do not militate against the conclusion of appellant that the burden in the instant matter rests upon appellee. They all involved pleadings by way of confession and avoidance, which, of course, placed upon the defendants therein the burden of proving their allegations.

IV.

EVEN IF THE DRAFTS IN LITIGATION WERE NOT DEPOSITED UNDER THE ACCEPTANCE AGREEMENT, THEY ARE SUBJECT TO DEFENDANT'S BANKER'S LIEN AND RIGHT OF SET-OFF.

If the drafts, the proceeds of which are the subject of this action, were deposited under the acceptance agreement, as appellant contends and as heretofore argued, they necessarily were subject to the terms thereof, and by virtue of the contract became security not alone for the acceptance indebtedness of the Richfield Oil Company to the appellant bank, but for any and all other indebtedness of Richfield to appellant. If, on the other hand, notwithstanding the overwhelm-

ing weight of evidence to the contrary, the drafts in question are held not to have been deposited under the acceptance agreement, then, nevertheless, they and the proceeds thereof were still subject to the appellant's banker's lien and right of offset. Appellant submits that appellee's cause must be impaled on either horn of this dilemma. Any relief which appellee claims under the second alternative depends upon the existence of a definite and binding agreement by the appellant to waive its banker's lien and right of set-off. This relief is not available to appellee if the case falls under the first alternative because of the parol evidence rule. In view of the terms of the acceptance agreement, the rule of *Berry v. Bank of Bakersfield* (supra) is not applicable if the drafts were deposited under the agreement, nor is it applicable even if the drafts are held not to have been so deposited. Unless it be pursuant to the terms of the acceptance agreement there was here no *specific indebtedness* for which the drafts were pledged as security.

The lower Court held that appellant waived its right to banker's lien upon the drafts in question at the outset of the transaction. (Finding VII, R. 183, 184; Conclusion III, R. 194.) This is specified as error. (Assignments Nos. III, IV, V, VI and VII, R. 479, 480, 481.)

(a) Statement of the Rule Regarding Banker's Liens.

The statement of the general rule of banker's liens appears frequently in statutes and decisions. Thus in California, Section 3054 of the Civil Code, codifying

the law of banker's liens as it previously existed, provides:

> "A banker has a general lien, dependent upon possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer, in the course of business."

In *American Surety Company v. Bank of Italy* (1923) 63 Cal. App. 149, 218 Pac. 466, the following appears:

> "It is settled law, and, indeed, as above indicated, it is expressly so provided by the law of this State (Civil Code, Section 3054), that a banker has a lien upon and so is vested with the right to appropriate any money or property in his possession belonging to a customer to the extinguishment of any matured indebtedness of such customer to the bank to the full extent of the money or property so possessed, if necessary, and so far as it may go toward such extinguishment, provided, of course, that such property or money so deposited has not been charged, with the knowledge of the bank, with the subservience of a special burden or purpose, or does not constitute a trust fund of which the banker had notice."

In 5 *Michie, Banks and Banking,* page 212, is found the following explanation of Banker's Lien:

> "The rule that a bank has a general lien upon or right of setoff against all moneys or funds in its possession belonging to a depositor to secure the payment of the depositor's indebtedness to it, is a part of the law merchant and well established in commercial transactions. The rule may be broadly stated that the bank has a general

lien upon all moneys and funds of a depositor in its possession for the balance of the general account, though the lien is only for accounts that are at the time due and payable. The rule rests upon the principle that as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such debt, and it has therefore a right to retain such funds until payment is actually made. The lien is given upon the theory that any credit the bank extends to its customer by way of loan or overdraft is given on the faith that money or securities sufficient to meet the debt at its maturity will come into the possession of the bank to discharge the same."

The rule and its purposes are well stated in *Citizens Bank & Trust Co. v. Yantis* (1926, Tex.) 287 S. W. 505. In this case the Court said, at page 507:

"We think it is clear from the authorities that, when a note or other security is placed in a bank by its customer for collection or for general account, in respect to mutual dealings as such, the bank has a lien upon the note or its proceeds to secure the payment of past due indebtedness. Likewise after maturity of its indebtedness it is authorized to apply any proceeds when collected to the payment of its indebtedness * * * This doctrine is not dependent solely upon any express agreement, but arises by implication growing out of the relationship of the depositor and the bank. It is a wholesome rule, and presupposes that for such accommodations extended by the bank, the bankable paper delivered to it will stand charged with a lien upon the proceeds."

As shown by the case last cited, the banker's lien attaches *even to commercial paper deposited with the bank for collection.*

In *Goodwin v. Barre Trust Co.* (1917, Vt.), 100 Atl. 34, the Court said, at page 37:

> "By a peculiar rule of the law merchant, which has come down to us through the common law of England, a banker has a lien on the securities and funds of his customer which come into his possession in the regular course of business as banker, and has the right to set off any matured debt against such funds without direction or authority from such customer. This lien and right of setoff applies not only to a general deposit of the customer, *but to any business paper belonging to him which he entrusts to the bank for collection, and to the avails thereof.*" (Italics ours.)

The rule is stated in *Garrison v. Union Trust Co.* (1905, Mich.) 102 N. W. 978, at page 980, as follows:

> "The general lien of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed * * * *and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right and placed by him with the bank for collection.*" (Italics ours.)

To the same effect see:

Muench v. Bank, 11 Mo. App. 144;
Joyce v. Auten (1900) 179 U. S. 591.

(b) The Conclusion of the Trial Court That Appellant Waived Its Banker's Lien Is Not Warranted by the Circumstances Surrounding the Original Transaction.

The evidence upon which appellee mainly relies in support of his contention that appellant waived its banker's lien is the testimony of Mr. Hall and Mr. Pope to the effect that Hall informed Gilstrap, Leuenberger and Lipman of appellant bank that it was to be understood that all transactions of Richfield with the Foreign Department of appellant were to be kept separate and apart from all other financial transactions of Richfield with appellant.

Mr. Hall's testimony is as follows:

> "I stated to him (Lipman) at that time my employment at the Richfield Oil Company, and I asked him to remember that any transactions were to be considered separate from other transactions of the Richfield, that is, the entire transactions, monetary, the collections of drafts for us or any other business connected with the Foreign Department of Richfield Oil Company." (R. 340.)

In this regard, Mr. Lipman's testimony, upon which counsel for appellee greatly rely, is as follows:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the Foreign Department and not the general treasury relations of the company, and he did not want the two mixed up; he wanted them kept separately. No discussion was had at that conference with respect to a banker's lien." (R. 449.)

These statements constitute appellee's strongest evidence to support the alleged waiver by appellant of its banker's lien or right of set-off.

It is apparent at once that the record is devoid of any *specific* agreement of waiver.

Mr. Hall at the time of contacting the officials of appellant bank, in August and October, 1930, was well aware of the heavy indebtedness of Richfield to appellant. Moreover, he was familiar with the right of a bank to a lien and offset against commercial paper and the proceeds thereof deposited with it in the ordinary course of business. (R. 340, 341.) Yet, despite this, Mr. Hall never at any time mentioned banker's liens or rights of offset to the officials of appellant. It is indeed singular that a man who was familiar with the lien of banks and the indebtedness of his company to appellant, and who, as he now asserts, intended to procure a promise from appellant waiving its lien upon the drafts in question, would resort to such weak and ambiguous language as that upon which appellee here relies as constituting an agreement of waiver. If Mr. Hall intended to prevent appellant from exercising a banker's lien, why did he not expressly and specifically tell the officials of appellant bank that he would only deposit Richfield Oil Company's foreign drafts for collection provided that appellant would agree to waive its lien or right of offset? The answer is quite obvious:—he did not intend any such thing, and the use of the statements of Hall as a basis for this action is an afterthought of the receiver to deprive appellant of its right to

retain the proceeds of the drafts in question. To suppose that a man who intended to procure a promise to waive a banker's lien would use the language here relied upon without even mentioning the allegedly intended waiver offends common sense.

Shortly before the commencement of the negotiations between Hall and the officials of the bank, appellant, as has hereinbefore been mentioned, loaned a large sum of money to Richfield Oil Company on an unsecured note, thereby exhibiting great confidence in the financial stability of the company. There is no evidence in this case, at the time of Hall's visits to San Francisco, of any indication of the possibility of receivership for Richfield. Under the undisputed facts there was no necessity, as far as the circumstances were then understood by the aprties to the acceptance transaction, for an agreement waiving lien.

In such a situation, how can the conclusion reasonably be reached that officials of appellant knew or should have known that Hall, by the use of the statements in question, intended to bring about a waiver of appellant's banker's lien, assuming that he actually did so intend? Under the circumstances the wildest stretch of the imagination would not have given an inkling that Mr. Hall might possibly have been intending to procure a waiver of such lien. It is wholly unreasonable that the officials of appellant should now be held to the necessity of interpreting at their peril the alleged, somewhat unintelligible, statements of Mr. Hall in the manner appellee now contends they should have been interpreted.

(1) Appellee's Argument is not Supported Even by the Testimony of His Witnesses.

It has been hereinbefore intimated that appellee's case was artificially constructed from strained inferences and from a retrospective view of transactions occurring subsequent to the execution of the acceptance agreement. As illustrative of this artificiality is the argument made by counsel for appellee in the lower court to the effect that there was a distinct agreement, intended by the parties to apply *only* to those drafts which, according to appellee's contention, were not to be deposited under the acceptance agreement, that such draft collections were to be kept separate and apart from other transactions of Richfield Oil Company and appellant, while those drafts deposited under the acceptance agreement were not to be kept so separate and apart. This argument was accepted by the lower Court and is embodied in Findings Nos. VII, VIII, XII, XIII, XVI and XVII. (R. 183, 184, 185, 187, 188, 189, 190.) The complete lack of foundation for this is found in the evidence produced by appellee himself. Mr. Hall's testimony as to the separateness of the acceptance transactions is general in nature and makes no distinction between drafts to be deposited under the acceptance agreement and those not to be deposited thereunder. According to him, *all* transactions with the Foreign Department of appellant were to be kept separate and apart. (R. 341, 343, 346.) Mr. Pope's testimony is to the same effect. (R. 264.)

The all-embracing statements of Hall most decisively refute the argument of appellee that in making them,

a contract to waive banker's lien was intended. *All* of the draft transactions were to be kept separate and apart, and yet admittedly a great many drafts were to be deposited under the acceptance agreement. In the face of a supposed intention that banker's lien was to be waived, two of the highest officers of Richfield Oil Company signed an acceptance agreement which contractually bestowed upon appellant the same rights as those provided by the law of banker's lien. Hall was present when Pope delivered this acceptance agreement to appellee, and moreover he saw the agreement before delivering it. (R. 360, 361.)

The existence of an intention to waive the right to banker's lien, arising from an agreement that *all* draft transactions were to be kept separate and apart, and the admitted existence of an agreement providing that at least some of the drafts were in effect to be subject to a lien, are inconsistent. This inconsistency effectively demonstrates that Hall was never imbued with the intention of procuring a waiver of lien when he made the statement, as he claims, that the Foreign Department transactions were to be kept separate and apart.

(2) The Real Intention of Mr. Hall.

In its opinion, the lower Court stated that it was admitted by appellant that the remarks alleged to have been made by Mr. Hall regarding the separate and apart character of the foreign transactions, were actually made. (R. 174.) This was not true. All witnesses for appellant, except Mr. Lipman, deny that Hall made these statements. And Mr. Lipman's

testimony substantially qualifies appellee's version of the Hall words, as will hereinafter be shown.

But even accepting the truth of Hall's statements, what he meant must on analysis appear quite obvious. Throughout his testimony he coupled his language as to keeping the transactions separate with the announcement that he had an interest in the Foreign Department collections. (R. 341, 343, 350.) He wanted his department to receive them so that he might in turn collect his commissions. Moreover, he was endeavoring to establish a new loan line with Wells Fargo Bank, based upon foreign collections. He had no power to bind the treasury department of Richfield. In fact, he told Gilstrap that he would have to take the matter up for approval with the treasury officials in Los Angeles. (R. 358.) Certainly, he could not expect to have the transaction approved if the new loan line was to reduce the $625,000.00 line which Richfield Oil Company had with appellant at that time. In other words, it was to be a separate loan. The logic of this construction of Hall's testimony is supported by that of Hellman. In recounting what Hall said to Lipman (and in checking the accuracy of Hall's statement, it is interesting to note that Hall denied that Hellman was present at the conference). (R. 343.) Hellman stated:

> "* * * he said, 'You must realize that I am not in the financial end of the business; that I am only the Manager of the Foreign Department, and I will have to get the consent of my superiors to get this credit through.' He further said that he knew we were giving them a line

> of credit of $625,000.00, and that if this acceptance credit was going to interfere with the loan line downstairs, he knew that they would not consent to it, and he wanted the acceptance credits separate from the loan downstairs." (R. 438.)

At the trial, counsel for appellee placed great reliance on the testimony of Mr. Lipman regarding the statements of Mr. Hall to him. Counsel were apparently so confident that his testimony supported their side of the case they waived cross-examination of Mr. Lipman, whereas all the other witnesses were subjected to minute and lengthy cross-examinations. Mr. Lipman's testimony in this regard is as follows:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the Foreign Department and not the general treasury relations of the company, and he did not want the two mixed up; he wanted them kept separately. No discussion was had at that conference with respect to a banker's lien." (R. 449.)

These words, instead of supporting appellee's position, explained the reason for the desire to keep the transaction separate. Hall could not speak for the treasury of his company, but only for the Foreign Department. Furthermore, Richfield obviously desired that its borrowing power in each separate credit line should not interfere with any other loan arrangements. Mr. Hellman's testimony corroborates this clearly. It was important therefore that the foreign transactions be separate from other transactions, but this is certainly far removed from an agreement, express or

even by legal implication, that appellant would waive its banker's lien and right of set-off.

(3) Comparison of Hall's Testimony With That of Witnesses for Appellant.

It is interesting to note that Mr. Hall was not content with testifying that he once or twice said to the officials of appellant bank that the transaction was to be kept separate and apart, and that he had an interest therein, but he took particular pains to repeat that story in almost the precise words a great number of times throughout his direct and cross-examination. He indicated that at every conference this statement was made. Frankly, appellant doubts this, and doubts whether it was ever emphasized during the course of the negotiations. Appellant doubts it as it does the accuracy of Mr. Hall's memory of the transactions. Repeatedly in his testimony at the trial, he contradicted statements made in his deposition. (R. 352, 353, 354, 356, 357, 363.) In fact, anticipating that such a thing would occur, counsel for appellee carefully elicited from Mr. Hall statements about his worried, rushed and uncertain condition when he gave his deposition (R. 339, 366), and yet Hall's physical condition for the past few years, his state of nervousness and stress (R. 351) lead logically to the conclusion that he was better able to remember the transaction at the time of his deposition, given almost a year before the trial, than at the trial itself. In passing, it should be noted that Hall claimed an interest in the proceeds of the drafts concerned in this litigation although the receiver has to date defeated his claim. (R. 354.)

As opposed to the discoursive testimony of Mr. Hall, we have the positive and definite statements of Gilstrap, Hellman and Leuenberger of appellant bank, that never once in the course of these transactions did Mr. Hall state that the business with the Foreign Department was to be kept separate and apart. (R. 370, 375, 376, 436, 437, 429.) And Mr. Lipman, on whose testimony appellee places great faith, stated that he had no recollection of any statement in which Mr. Hall told him that Hall had an interest in the transaction, and if such a statement had been made he would definitely have remembered it. (R. 449.) Gilstrap, Hellman and Leuenberger deny, with a positiveness equal to their denial of the alleged statements as to the separate nature of the transactions, that Hall ever disclosed that he had any interest in the transactions of the Foreign Department. (R. 369, 375, 376, 437, 428.)

The statements of Hall made subsequent to May 8, 1931 (R. 350), when the appellant bank announced that it was exercising its banker's lien, are obviously irrelevant to these proceedings. In this connection Mr. Gilstrap testified that he believed Mr. Hall made mention on his visit after May 8th of having an interest in the transactions and asserted an agreement that the Foreign Department business was to be separate from the other affairs of Richfield Oil Company. (R. 388.) This, as a frank admission, strengthens rather than weakens Gilstrap's testimony with respect to what transpired before the exercise of the lien. Neither Hellman nor Eisenbach nor Motherwell recall any such statement made to them by Hall at the con-

ferences subsequent to May 8, 1931. (R. 440, 458, 461, 462.)

(4) The Improbability of the Existence of an Agreement Waiving Lien.

Appellant submits, moreover, that the probabilities are against there having been any agreement on the part of appellant bank directly or indirectly to waive its banker's lien or right of set-off. Notwithstanding Hall's testimony as to his familiarity with such rights, it is seldom, if ever, that the parties contemplate the existence of, or negotiate with respect to, banker's liens or rights of set-off at the time when a loan is made.

Notwithstanding the inference of counsel for appellee during the trial, that in the fall of 1930, Wells Fargo Bank might have been worried about the financial condition of Richfield Oil Company, the record is clear that the original note of Richfield was renewed in July of the same year, an additional loan of $125,000.00 being then made, and that Mr. Lipman considered the loan good. Appellant submits that not alone was the so-called "separate and apart" agreement not made, but even if it was, neither Hall nor appellant contemplated or dealt with the right of lien or set-off.

(c) The Conclusion of the Trial Court That Appellant Waived Its Lien Is Not Warranted as a Matter of Law.

Appellee argued, and the lower Court held, that the statements of Mr. Hall upon which appellee relies, caused the drafts of Richfield to be deposited as a trust or as a special deposit. In support of this posi-

tion, a number of authorities were cited, which will be hereinafter discussed. If the statement that the drafts in question were to be kept separate and distinct from all other financial transactions between Richfield and appellant gives any assistance to appellee's case, it does not amount to the creation of a special deposit or trust, but to an agreement that the defendant would waive its lien or right of set-off. That such a statement would not amount even to this has been heretofore discussed on the facts and will be shown presently as a matter of law.

Appellee must overcome the legal presumption that a waiver of lien was not intended. In *Tanksley v. Tanksley* (1932 Wash.) 17 Pac. (2d) 25, the Court said at page 28:

> "* * * the presumption touching the waiver of statutory or other lien rights is always *strongly* against such a waiver having been made." (Italics ours.)

Further cases of a similar nature will be hereinafter cited particularly in connection with the question of waiver subsequent to the appointment of the receiver.

Disregarding for the moment the alleged statements of Hall, appellant had from the start a lien upon the paper deposited for collection. Strictly speaking, this was properly converted into a right of set-off when the drafts were collected. Therefore, any supposed waiver on the part of the appellant would be referable as well to its right of set-off as to its lien.

A. The Authority of Updike v. Oakland Motor Car Co.

In *Updike v. Oakland Motor Car Co.* (1931) 53 Fed. (2) 369, the Oakland Motor Car Co. repurchased the equities in certain automobiles owned by one of its dealers, the latter being then close to financial difficulties. Instead of paying cash as agreed by it, the Oakland Motor Car Co. set off the amount of the repurchase price against the indebtedness of the dealer to it. The trustee in bankruptcy brought action to recover the purchase price on the ground, among others, that the Oakland Motor Car Co. had by agreement waived its right of set-off. This was predicated on the agreement by the Oakland Motor Car Co. to pay for the equities in cash and on the promise of the company to carry the advertising account of the dealer indefinitely. The Court, at page 372, said:

> "The appellants argue that Oakland should have paid for the equities in the cars in cash instead of taking setoffs for all but $50,000. Stratton said the agreement was to pay in cash, and the trial judge evidently believed him. *But Stratton never claimed that Oakland in terms promised not to exercise the right of setoff or that the payment was to be a special deposit in Stratton's favor or was to be applied by Oakland in some specific way.* Stratton did say that Oakland promised to carry the advertising account indefinitely. But such a promise would not in itself prevent a setoff even now. Moreover, if there was a promise to pay cash, that was not an agreement to apply the moneys for a particular purpose or to hold them as a special deposit. It involved no fiduciary relation, but only a promise by Oakland to Stratton. *An agreement must be clear and*

> *specific to deprive a party of the ordinary right of setoff.* Stratton was trying to get $250,000 from Oakland to tide his company through the winter and was hoping against hope for ready cash, but he got no agreement not to set off and the right of setoff existed because the claims were mutual." (Italics ours.)

It is submitted that the agreement to pay cash in the cited case was far stronger as a waiver of set-off than are the alleged instructions of Hall in the case at bar. Here no contention has been made that there was ever any mention by Hall or anyone else of banker's lien or right of set-off, notwithstanding that Hall knew at the time of his conferences with the bank officials of the existence of banker's liens. The conclusion is irresistible that one who was attempting, as Hall claims he was, to effect a waiver of a banker's lien or right of set-off, would have so stated specifically instead of using such ambiguous language as is here contended amounts to an agreement of such waiver.

B. The Strong Analogy of American Surety Company v. Bank of Italy.

The case of *American Surety Company v. Bank of Italy* (1923), 63 Cal. App. 149, previously cited, is completely destructive of the holding of the lower Court that the alleged acquiescence of appellant in the statements of Hall amounted to a waiver of banker's lien. In that case a depositor in the defendant bank had six accounts under the following names: (1) Ernest Green account; (2) Ernest Green, Milliken Bridge account; (3) Ernest Green, Kewin Garage account; (4) Ernest Green, Davis Garage

account; (5) Ernest Green, account of son; (6) Ernest Green Silva Garage account. The depositor was engaged in the building contract business and opened these accounts in this manner so that each one would apply to a separate contract. The defendant bank appropriated the account designated "Ernest Green, Silva Garage", to satisfy an indebtedness due from the depositor to the bank. It was contended and so held by the lower Court that the designation of the account in this manner created a special deposit or trust which prevented the exercise by the defendant of its banker's lien. Assuming that Hall in the case at bar intended by his statements, as appellee argues, to procure a waiver of lien by appellant, and assuming, as was contended and urged in the cited case, that the depositor therein intended the same thing, it is immediately apparent that *American Surety Company v. Bank of Italy,* supra, is similar on its facts to the case at bar and strong authority for appellant's position. It is true that in the cited case there was no express statement that the deposit was to be kept separate and apart from other financial transactions with the bank, but nevertheless, the designation of the account as a separate account was tantamount to such an instruction. The District Court of Appeal, in holding that the defendant bank had a right to exercise its lien upon this deposit, and in reversing the judgment of the lower Court, said, at page 159:

> "A banker is not required to go 'snooping' about to learn from what source his depositors obtained the moneys which they deposit in his bank. His duties as a depositary of moneys are

fulfilled if he keeps and handles the moneys deposited with him according to the requirements of the depositor or the conditions upon which the deposit is made, *and these requirements or conditions, if they impose something beyond his usual or ordinary obligations in the matter of the handling of the deposits of money, must be brought home to him by instructions by the depositor or an agreement between him and the depositor so clear or so unambiguous and unequivocal as to leave no room for a reasonable doubt as to their meaning and scope.* A depositor may establish an account in a bank under a special designation or earmarked as a particular account, and yet, in the absence of an agreement with or instructions to the banker that the account so earmarked is a special deposit or is to be used for a specific purpose, the moneys deposited therein are to be regarded as belonging to the general account of the depositor and may be so treated by the bank. * * * The 'earmarking' of a bank deposit or giving to it a special or particular designation, even when the bank has, by the request of the depositor, entered in its deposit books the deposit as so earmarked or designated, *can mean nothing, so far as the bank is concerned, in the absence of specific instructions to the bank by the depositor that the deposit is to be used for the special purpose indicated by the 'earmark' or designation.* So far as the record here shows to the contrary, Ernest Green might have caused the several accounts opened by him in the defendant bank and given each a special and different earmark for his own convenience. Such a practice, as we know from common knowledge, is quite general among business men, particularly those engaged

in the wholesale trade. For their own convenience they keep a separate account of the different commodities in which they deal. Thus they are the more readily able to learn whether there be profit or loss in the sale of any particular commodity. And so, probably, with building contractors having a number of different contracts for the construction of buildings concurrently in the course of execution. But the outstanding fact in this case is, as above explained, that there is no evidence in this record showing that there was any understanding between the bank and Green or any direction by the latter to the bank that the account in controversy was opened and the money therein deposited would be appropriated to a special purpose, and it follows that the said account, unless for other reasons it involves a trust fund, *constitutes a general deposit of said Green, even though the defendant knew or had reason to believe that the funds so deposited were to be devoted to the payment of the claims of materialmen, mechanics and laborers furnishing material for and performing labor on the Silva Garage.*" (Italics ours.)

Although the case last cited deals specifically with the deposit of money, there is no reason why the rule thereof should not be equally applicable to deposits of commercial paper. In fact, California Civil Code, Section 3054, expressly provides that a banker has a lien "upon *all property* in his hands".

The rule of law being, as stated in *American Surety Company v. Bank of Italy* and *Updike v. Oakland Motor Car Company,* that the conditions and requirements under which a deposit is made must be brought

home to the banker by instructions or by an agreement between the banker and the depositor "so clear, or so unambiguous and unequivocal as to leave no room for reasonable doubt as to their meaning and scope" where such conditions and requirements import something beyond the usual or ordinary obligations of a banker in handling deposits, it is submitted that appellee's case in this respect, resting as it does upon the aforesaid alleged assertions of Mr. Hall, completely falls. The only convincing thing about these assertions is that they were ambiguous, uncertain and equivocal as to any purported waiver of appellant's lien. Mention has heretofore been made of the other purposes to which these statements were just as referable as they were to a waiver of banker's lien. Under the holdings of the last two cited cases, if the language relied upon as constituting a waiver of set-off or banker's lien is capable of meanings other than that so claimed, the ordinary rights and duties of the bank remain unchanged.

C. No Special Deposit was Created.

The Court below held in Conclusion No. V of its Conclusions of Law (R. 195) that the alleged instructions of Hall caused the drafts in question to be deposited specially as a trust fund, and consequently were immune from the operation of the law of banker's liens. This theory, as well as the theory of waiver of lien, is considered in *American Surety Co. v. Bank of Italy,* supra, where it was likewise claimed that a special deposit had been created. But the Court held that because of the ambiguity of the

instructions relied upon, no special deposit or trust was ever created.

If the words alleged to have been used by Hall had the effect of creating a special deposit, it is pertinent to ask for what purpose was it created? The answer is (without considering any question of banker's lien) that the proceeds were to be turned over to Richfield Oil Company the same as they would have been if, as appellant contends, the deposit was general. There was consequently no special purpose involved in the deposit of the drafts.

A special deposit may be created by the deposit of funds in the custody of a banker with the direction that they be kept separate from other funds of the bank and the identical money returned to the depositor, or a special deposit may be created where the funds are not to be kept separate from the other moneys of the bank but the deposit is to be used only for a special purpose. These two types of special deposits differ particularly in the circumstances under which the legal effect thereof is considered but the reasoning of the Courts with respect to the creation of either type is equally applicable to both.

In *Butcher v. Butler* (1908, Mo.), 114 S. W. 564, one party to a contract deposited money in the defendant bank for the purpose of having it paid to the second party to the contract. The bank made out a deposit slip containing the following language: "trust fund by P. T. Becker * * * checks as follows: $1000.00 to be paid to Butcher when he shall have put his drill down 1000 feet. $1000.00." The question

was whether these facts were sufficient to create a trust fund or special deposit in the sense that the moneys deposited were to be kept separate from the other funds of the bank giving the depositor a preference over the assignee for the benefit of creditors. In holding that no such trust or special deposit had been created, the Court said, at page 566:

> "In the absence of proof to the contrary, a deposit is presumed to be general, and it devolves on the party who claims it is not *to show that it was received by the bank with the agreement, expressed or clearly implied, that it should be kept separate from the other funds of the bank, and the identical money returned to the depositor.* The deposit under consideration, we think, was general, not special. *There was no intention or thought entertained by Becker, Butcher or the bank that the funds deposited were to be kept separate and the bank deprived of their use.*" (Italics ours.)

In *Minard v. Watts* (1910), 186 Fed. 245, funds were deposited in a bank during the pendency of litigation to abide the final decision of a controversy over the title to land. The question again was whether the depositor was entitled to a preference in bankruptcy. It was agreed by the parties that there was not at any time any expressed agreement or understanding that the deposits were to be held or kept separate from the general funds of the bank. The Court said, at page 247:

> "It is the business of a bank, and one of the purposes for which it was created, to receive the money of its depositors on the implied agreement

to return a like amount on demand or in a stipulated length of time, with or without interest, as the case may be, and to loan such money to its customers, receiving compensation by way of interest charged. Banks are not created for the purpose of acting as bailees of the property of others, either with or without hire. While a national bank by contract may possibly bind itself to such legal relation, *it is quite clear this may be done only either by express contract, or the transaction of deposit must, from its very nature be of such character as to imply such obligation and relation.* Mr. Morse, in his work on Banks and Banking (2d ed., p. 69), says:

> 'Ordinarily, a deposit of money, at least if it be the current money of the country or state where the deposit is made, will be assumed to be a general deposit, unless the contrary is at the time directly notified, or in some shape distinctly implied, *so that the bank could not reasonably misunderstand the depositor's intent.*' "

In *Clay County Bank v. First National Bank* (1929, Ark.), 13 S. W. (2) 595, the question was whether the presentation by a depositor of a list of outstanding checks which were to be paid from his deposit was sufficient to create a special deposit precluding the bank from exercising its right of setoff or banker's lien. The Court held that this was not sufficient to create a special deposit and the bank was entitled to its lien or right of setoff upon the funds in question.

There is no evidence in the record of the case at bar of a single word or act on the part of any officer or employee of appellant which indicates an intention to

waive the lien. Appellee's case is founded solely on the statements of Hall. From the record, no response to these statements was made. This absence of anything said or done on the part of appellant conclusively prevents the existence of a waiver.

In *Bray v. Booker* (1899, N. D.), 79 N. W. 293, the Court, in holding there had been no waiver of a vendor's lien, reasoned as follows, at page 297:

> "Of course, the lien may be waived by any act or declaration of the vendor clearly evincing a manifest intention so to do. But the circumstances must certainly be exceptional if a waiver can ever be inferred from his silence, and that is all we have in this case, except the fact that the vendor executed the deed after Mr. Booker had expressly refused to give a mortgage on the property, and after he had stated that he desired to turn the property over to Mrs. Booker free from all incumbrances. *But these were simply declarations of the vendee, to which some affirmative response must have been made by the vendor before any of his rights can be concluded thereby.*" (Italics ours.)

It is submitted that none of the cases cited leave any room for doubt that a banker's lien is not waived or a special deposit created unless *specific* and *express* language to this effect is used, or the existence of such lien or special deposit may be *distinctly* and *unambiguously* implied. Again appellant submits that the assertions of Mr. Hall do not measure up to the legal requirements necessary to support the conclusion of the lower Court.

(1) In Order to Constitute the Deposit of the Drafts as a "Special Deposit" Both Appellant and Richfield Must Have Understood the Deposit to be for a Special Purpose Only.

In *In re North Missouri Trust Co.* (1931, Mo.), 39 S. W. (2) 412, plaintiff deposited funds in an insolvent bank with the direction that they were to be used to buy bonds for him. Plaintiff claimed that because of this instruction he was entitled to a preference over the other creditors. The Court held that no special deposit had been made and, at page 414, said:

> "Beyond this, they hold (cases cited) that in determining whether a deposit is general or special not only is the purpose for which the deposit is made and received to be considered, but also the mutual intention of the parties when the deposit is made; that, in other words, whether the deposit is general or special is to be determined from the bona fide contract of the parties; *that in order to constitute a special deposit, the facts and circumstances must show that the bank and the depositor both understood that the fund was to be held for a special purpose and that the bank should not pay checks drawn against it for any other purposes;* * * *" (Italics ours.)

In *Ellington v. Cantley* (Mo. 1927), 300 S. W. 529, money was deposited in a bank with a statement by the depositors that they wanted to pay therefrom the interest on their real estate loan with an insurance company. The action was to determine whether as a result of these statements they were entitled to a preference over other creditors or whether the bank could properly exercise its banker's lien against the deposit on account of the past due indebtedness of the

depositors. The Court, in denying the claim to preference and upholding the bank's lien right, said at page 531:

> "In order to constitute the $840 a special deposit, the facts and circumstances would have to show that the bank and plaintiffs both understood that the $840 was to be held for the special purpose of paying plaintiffs' interest, and that the bank should not pay checks drawn against it for any other purpose."

In *Craig v. Bank of Granby* (1922, Mo.), 238 S. W. 507, the manager of a mining company told the Cashier of the defendant bank that he would later deposit money in the bank to meet the payroll of the mining company. The trustee in bankruptcy of the mining company brought an action against the bank, claiming that the conversation of the manager with the cashier of the bank created a special deposit against which the bank had no right to exercise a banker's lien. The Court upheld the bank's right of offset, reiterated the rule that the burden of showing the account as "special" rests on the person so claiming, and said at page 509:

> "In order to have made this a special deposit for the purpose of paying the payroll checks, both the depositor and the bank must have understood that this money was to be held for that purpose, and that no other checks were to be paid from it * * *."

There is nothing in the record which indicates that appellant understood that a special deposit of the Richfield foreign drafts was intended nor is there any

evidence of circumstances by reason of which appellant should have known this. Certainly the bare language of Hall that the foreign department transactions were separate was not sufficient even to put appellant on inquiry. It is far less strong than the language, written and oral, in the cases previously cited and which was held insufficient to defeat the bank's lien.

Appellee contended in the Court below that the deposit by appellant of the proceeds of some of the drafts not involved in this action to the account of appellee as receiver of Richfield Oil Company without exercising its right of setoff, displayed an understanding on the part of appellant that a waiver of lien was intended by Hall. That appellant did not so understand these statements is conclusively shown by the telegram sent by appellant to appellee as receiver of Richfield Oil Company on January 16, 1931 (R. 210), in response to the receiver's telegram of the same date. (R. 209.) The following quotation therefrom is pertinent in this respect:

> "We are holding certain collections as security for acceptances. Please understand that we continue to reserve all our rights for banker's lien against these collections."

The argument that the act of depositing the proceeds of some of the drafts to the credit of the receiver indicated an understanding on the part of appellant that a waiver of lien had been agreed to or was even intended, will be hereinafter further considered in connection with the question as to whether the lien or right of setoff was waived subsequent to the appointment of appellee as receiver.

(2) Legal Effect of Hall's Instructions When Subjected to the Analogy of the Cases on Waiver of Mechanics' Liens.

The authorities involving waiver of mechanics' liens assert the principles which, it is submitted, are controlling on the question involved in the instant matter. In all these cases the alleged waiver agreements were entered into at the outset of the arrangements for construction, just as the statements by Hall are alleged here to have been made early in his negotiations with appellant.

In *Gray v. Hickey* (1917, Wash.), 162 Pac. 564, the Court said, at page 566:

> "We do not construe this provision of the contract as a waiver of Gray's lien right for the work to be performed by him. It in any event is not a clear waiver of such right. The rule seems to be that, when the terms of the contract are ambiguous in this respect, they should be construed most favorably to the person claiming the lien right."

In *Carl Miller Lumber Co. v. Meyer* (1924, Wis.), 196 N. W. 840, the Court, in holding that an agreement was insufficient to effect a waiver of a materialman's lien, said, at page 842:

> "There is no doubt that the plaintiff could have waived the right to file a lien by express agreement, although when an agreement relied on as a waiver is ambiguous the doubt should be resolved against the waiver."

In *Kokomo F. & W. Traction Co. v. Kokomo Trust Co.* (1923, Ind.), 137 N. E. 763, the Court said at page 765:

> "All of these cases recognize the rule of law that a builder may waive the right of himself and those claiming under him to the lien given by statute * * * *But they hold that, in the absence of evidence contained in the contract that it was clearly the intention to make such a waiver, it must be presumed that the builder has not disabled himself from enforcing a lien, and that where the terms of the contract are ambiguous on the question, the doubt must be solved against such a waiver.*"

In *Central Illinois Construction Co. v. Brown Construction Co.* (1907), 137 Ill. App. 532, a provision in a building contract provided that

> "the completed work when offered to the company for acceptance shall be delivered free from any and all liens, claims or encumbrances of any description."

The Court in holding that this did not amount to a waiver of the contractor's lien, said, at page 535:

> "Where the provisions of the contract relied upon as constituting a waiver of the statutory right to assert and enforce a lien are ambiguous, the doubt should be resolved against the waiver."

In *Davis v. La Crosse Hospital Assn.* (1904, Wis.), 99 N. W. 351, a building contract provided that the completed building should be delivered to the owner free from all claims, liens and charges. In holding that the builder had not waived the right to exercise his lien, the Court said, at page 352:

> "A builder may waive his right to the lien remedy given by statute and does so by agreeing

> not to exercise such right * * * *But where the terms of a contract are ambiguous on the question, the doubt should be resolved against the waiver, since it should be presumed, in the absence of clear evidence to the contrary, that one has not disabled himself from the use of so valuable a privilege as that given by statute for the enforcement of a builder's rights in the circumstances involved in such a case as this.*" (Italics ours.)

The language in the case last cited is significant; it is submitted that in the case at bar it must be presumed in accordance with the recognized principles applicable to special accounts and waiver of rights that appellant did not disable itself from the use of so valuable a privilege as that given by the statute for the enforcement of a banker's lien against the drafts in question and the proceeds thereof.

The following quotations from *Selna v. Selna* (1899), 125 Cal. 357, 362, a case involving the waiver of a vendor's lien, is in point:

> "The burden of proof is on the purchaser to establish that in the particular case the lien has been intentionally displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches. And so long as the debt exists courts will not presume that the lien has been waived, except upon clear and convincing testimony."

It is at least doubtful, although appellant does not concede even this, whether the lien was waived, and under the foregoing case and others cited the presence of such doubt precludes a holding of waiver.

Further authorities relating to the waiver of liens will be hereinafter cited with reference to the question as to whether appellant waived its banker's lien subsequent to the appointment of appellee as receiver. These cases are equally applicable here in determining the legal effect, if any, to which the alleged instructions of Hall are entitled.

(3) In Event of Uncertainty, the Language of a Contract Should be Interpreted Most Strongly Against the Party Who Caused the Uncertainty to Exist.

The uncertainty or ambiguity which appears in the language used by Mr. Hall was certainly caused by Hall himself. Therefore, such ambiguity should be interpreted most strongly against appellee who relies upon such language. Section 1653 of the Civil Code of the State of California provides:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promissor is presumed to be such party."

In *Sternberg v. Drainage District,* 44 Fed. (2) 560, at page 562, the following appears:

> "If the contract is ambiguous, the plaintiff is responsible for its ambiguity and under such circumstance, the contract should be construed most strongly against the party preparing it."

In *Continental Oil Co. v. Fisher,* 55 Fed. (2) 14, at page 16, it is said:

> "It may be true the intention of Continental Oil Company was to contract for this privilege

> of reassignment. Their tenders indicated they had that theory of the 'modification agreement'. But why was the option not mentioned? A capable lawyer for the company drew the contract, and even if we assume the instrument to be ambiguous in this respect, the rule applies that the doubt be resolved against the party who drew it."

The issue involved in the last cited case was whether an agreement between the parties could be construed to include an option of reassignment. The question asked by the Court in the quotation hereinabove set forth is particularly pertinent, for appellant may reasonably inquire, as it has throughout this brief, why, if Mr. Hall intended to secure a waiver of a banker's line, did he not mention this specifically? It is submitted that since Hall, Richfield's representative, used the language relied upon and since it is ambiguous, it must be construed most strongly against appellee. The application of this principle is an added bar to any interpretation that appellant waived its banker's lien or right of setoff.

(4) Examination of Authorities Relied Upon by the Trial Court.

In his opinion, Judge Norcross cited the following cases as authority for his conclusion that a special deposit was created by the alleged instructions of Hall to appellant:

> *Raynes v. Du Mont* (1889), 130 U. S. 354;
> *Union Bank & Trust Co. v. Loble* (1927), 20 Fed. (2) 124;
> (R. 179.)

These cases and others upon which appellee relied in the Court below quite properly hold that a special deposit or a deposit in trust operates to destroy the right of a bank to exercise its lien. In all of these authorities, however, the facts were such that there could be no doubt about the existence of a special deposit. The question as to the existence of a trust or special deposit or of a transaction removed from the ordinary course of business is naturally dependent for its answer upon the facts.

In *Raynes v. Du Mont,* supra, one bank deposited collateral in a second bank for the express purpose of securing the indebtedness of a third bank. The depositary, after satisfying the indebtedness of the third bank from these securities, attempted to exercise a banker's lien on the surplus as an offset to the indebtedness to it of the depositing bank. The Court correctly held that this was a deposit for a special purpose and therefore not subject to banker's lien.

In *Union Bank & Trust Co. v. Loble,* supra, money was deposited in the defendant bank for the express purpose of paying certain creditors of the depositor. Here again it was held that the deposit was one for a special purpose and not subject to banker's lien.

It is obvious that there is a great difference between the foregoing facts and those in the case at bar. There could be no question in these cases that the deposits were for special purposes. In all of the authorities relied upon by appellee at the trial, the facts were substantially similar to those of the two cases last noted.

The Court further cited:

Buckner v. Leon & Co. (1928), 204 Cal. 225, 267 Pac. 693;

Campbell v. Miller (1928), 205 Cal. 22, 269 Pac. 536;

Blahnik v. Small Farms Imp. Co. (1919), 181 Cal. 379, 184 Pac. 661;

Savings Bank v. Ashbury (1897), 117 Cal. 96, 48 Pac. 1081;

Smith v. Smith (1918), 200 S. W. 445;

(R. 179.)

These cases merely hold that where a contract is on its face incomplete, extrinsic evidence of contemporaneous parol agreements may be introduced. They were cited by the Court in support of its conclusion that since the acceptance agreement is blank as to the drafts deposited thereunder, parol evidence was admissible to prove which drafts were and which were not so deposited. There can be no question about the correctness of this ruling. However, as hereinbefore argued, if it be found that the drafts were deposited under the acceptance agreement, then as stated in Subdivision (c) of the Eighth Assignment of Error (R. 482, 483), the Court below erred in admitting evidence as to the aforesaid instructions of Hall to the bank, for such instructions, if they were to be construed as effecting a waiver of lien, were in direct conflict with the provisions of the acceptance agreement that all drafts deposited thereunder would be security for all other indebtedness

from Richfield Oil Company to appellant. See *Davis v. Stanislaus Co. Farmers Union* (1925), 72 Cal. App. 698, 238 Pac. 95; and 10 *California Jurisprudence* 927, to the effect that even though a written agreement may be blank in certain respects, parol evidence in conflict with its *express* terms is inadmissible.

(5) The Burden of Proving That the Deposit of Drafts Was Special Rests Upon Appellee.

Not only does the burden of proving that the deposit of the drafts was special rest upon appellee, but he is likewise faced with the rule that all deposits are presumed to be general unless proven otherwise by clear and convincing evidence.

In *In re North Missouri Trust Co.* (1931, Mo.), 39 S. W. (2) 412, the following appears:

> "Under the rule of these authorities, the presumption is that a deposit is general, and the burden of proving otherwise is on the person claiming priority as a special depositor."

In *Craig v. Bank of Granby* (1922, Mo.), 238 S. W. 507, at 509, the Court holds:

> "In the absence of proof to the contrary, all deposits are presumed to be general deposits, and the burden was upon plaintiff in this case to show that the deposit of $1000.00 was made by it to meet the payroll checks that had been previously issued, and that this money or its equivalent was to be applied to the payment of these checks, *and that the bank so understood it at the time.*" (Italics ours.)

To the same effect see *Butcher v. Butler* (1908, Mo.), 114 S. W. 564; *State v. Farmers & Merchants Bank* (1926, Neb.), 207 N. W. 666.

Appellant submits that the Finding of the lower Court that appellant waived its banker's lien on the drafts in question at the inception of the foreign draft transactions, if allowed to stand, will place a premium on uncertainty in banking transactions; it will be a source of confusion in the future, and will do violence to the sound and wholesome policy of the law in favor of upholding banker's liens. If such a doctrine as that for which appellee here contends should prevail, banker's liens, as stated by an early Missouri Court, "would soon become plants of delicate and exotic growth". (*Major v. Buckley* (1873), 51 Mo. 227, 232.)

In view of the ambiguity of the language upon which appellee relies to show that appellant waived its banker's lien; in view of the rule as set forth in Bank of Italy v. American Surety Company, supra, Updike v. Oakland Motor Car, supra, and similar cases, that an agreement waiving setoff must be specific in terms; in view of the rule of presumption respecting waiver of liens; in view of the presumption against special accounts; and in view of the rule that the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, it is submitted that the statements of Hall relied on by appellee, even if they be given their strongest aspect, are insufficient to constitute an agreement by which appellant waived its banker's lien and right of setoff.

V.

APPELLANT DID NOT WAIVE EITHER ITS CONTRACTUAL RIGHT OR ITS BANKER'S LIEN OR RIGHT OF SETOFF BY ANY AGREEMENT, REPRESENTATION OR ACTION SUBSEQUENT TO THE APPOINTMENT OF THE RECEIVER, NOR IS APPELLANT ESTOPPED FROM ASSERTING SUCH RIGHT OR LIEN.

The lower Court found (Findings No. XIX, XX and XXI) (R. 190, 191, 192) that, by reason of the wording of a telegram sent by appellant to appellee in response to a telegram from the latter, and by reason of the events which occurred subsequent to this exchange of telegrams, appellant waived its banker's lien or right of setoff on the drafts involved in this litigation. The telegram sent by appellee to appellant is as follows:

> "As Receiver I am ordered by Federal Court to take over all assets including cash in banks Stop While you have undoubted right of offset, such right if exercised will seriously cripple receiver's operations. It is necessary therefore to request that all banks restore to receiver such *cash balance.* Please therefore transfer *such funds* to a new account on your books in my name as Receiver. Evidence of my authority and signature cards will follow by mail Stop Local banks have indicated they will acquiesce in this program.
>
> William C. McDuffie,
>
> Receiver for Richfield Oil Co. of California."
>
> (Italics ours.)
>
> (R. 209.)

Appellant's reply, which the Court construed as waiving its banker's lien, is as follows:

"Replying telegram we are willing to restore into your name as Receiver Richfields *balance in checking account* provided we are notified by you that all Company's banks have taken similar action Stop We are holding certain collections as security for acceptances please understand that we continue to reserve all our rights for banker's lien against these collections.

Julian Eisenbach,
Vice President Wells Fargo
Bank & Union Trust Co."

(Italics ours.)
(R. 210.)

Both telegrams were sent on January 16, 1931, several months prior to the receipt by appellant of the proceeds of the drafts which are the subject-matter of this litigation.

The argument of appellee, which the Court below apparently accepted, was that in the last sentence of its telegram, appellant, by the use of the word "certain", referred only to those collections which, according to the contention of appellee and the Finding of the Court below, were deposited under the acceptance agreement; that appellant reserved its banker's lien solely against these collections, and then only to the extent necessary to liquidate the outstanding acceptances, concluding that since nothing was said about drafts which, according to appellee's contention were not deposited under the acceptance agreement, appellant must have intended to waive its lien as to these drafts. In addition to the strained and unnatural construction thus given to appellant's tele-

gram, appellee's argument rests upon the false assumption that the bank recognized that some drafts were under the acceptance agreement and others not. Irrespective of the sincerity of Richfield's or appellee's belief in this distinction the evidence is overwhelming that the bank never acknowledged any such difference. Hence the premise, upon which appellee's conclusion is based, is contrary to fact.

(a) Normally and Properly Construed, Appellant's Telegram and Subsequent Conduct Permit no Inference of Waiver of Lien on the Richfield Foreign Drafts.

(1) Appellant's Telegram Waived Banker's Lien or Right of Offset Only Upon Cash Balances Which Existed at That Time.

On January 15, 1931, appellee wrote to appellant, informing the Bank of his appointment as the Receiver of Richfield Oil Company of California, stating his desire to open an account with the Bank in the name of the Receiver, and concluding his letter (R. 203, 204) as follows:

> "In opening the account of Richfield Oil Company of California, William C. McDuffie, receiver, please transfer the balance appearing to the credit of the Richfield Oil Company of California at the close of business January 14, 1931, to the credit of the account 'Richfield Oil Company of California, William C. McDuffie, receiver' * * *" (Italics ours.)

In the meantime several of the company's banking creditors, including appellant, had appropriated outstanding balance in satisfaction of its indebtedness to them.

Thereafter, on the 16th day of January, 1931, a group of bankers representing most of the banking creditors, met with Mr. McDuffie (See Mr. McDuffie's testimony) who requested their cooperation and informed them that it was essential to the receivership that he have available, funds to carry on the business. He urged those bankers who had already exercised their banker's lien against Richfield's funds to restore the balances and asked the others who had not yet exercised their rights to refrain from doing so. (R. 206, 207, 208, 209.) Appellant objected to the testimony as to what transpired at this meeting upon the ground that no representative of the defendant bank was present. (R. 207.) To meet this objection, counsel for appellee attempted to prove through the testimony of the witness Edward J. Nolan that what transpired at the meeting was told to Mr. Julian Eisenbach, one of the vice-presidents of appellant bank, in a telephone conversation of January 16th. The argument with respect to the admissibility of this testimony will hereinafter be stated. Even if relevant and proper, the testimony of what took place at the meeting is not actually of importance because the exchange of telegrams between the parties must necessarily exclusively embody appellee's right, if any. As a result of this meeting, the two telegrams of January 16th hereinbefore set forth, were exchanged.

Mr. Nolan's testimony as to how much of what occurred at the meeting was conveyed to Mr. Eisenbach is not clear. In response to a question propounded upon direct examination, he stated:

> "I recall explaining to Mr. Eisenbach that unless all of the banks were unanimous in returning the *balances* that it looked to me as if the Company would have to go into bankruptcy; that Mr. McDuffie had stated to us that he would have to have certain funds to take care of public utility charges, labor charges and freight rates; that is about all I told him." (R. 243.)

Nothing was mentioned in the telephone conversation with respect to the future course of business of the receivership. (R. 243.) Mr. McDuffie had said nothing about the draft collections with Wells Fargo Bank & Union Trust Co., and Mr. Nolan said nothing about them in his conversation with Mr. Eisenbach. The whole purpose of the telephone conversation was as Mr. Nolan said:

> "* * * to explain the dire condition of the receivership; that if the *balances* were not restored or if the banker's liens were to be exercised by the different banks that it would be necessary for the Company to go into bankruptcy." (Italics ours.) (R. 246.)

Mr. Nolan further testified that in conjunction with Mr. McDuffie, Mr. Hardacre and the other bankers present ("it being the work of about twelve of us" (R. 245)), the Receiver's telegram of January 16th was prepared for transmission to each of the banking creditors. What the agreement, if any, between the bankers was supposed to be, is expressed by Mr. Nolan in response to a question on cross-examination as follows:

> "The whole question of agreement between the banks was to restore the *cash balances* and such

items as were in transit. For instance, in our institution there were many items in transit from the branch banks."

(R. 244.)

While Mr. McDuffie and his counsel urge that the supposed agreement was intended to apply to future credits, such was not Mr. Nolan's testimony, nor does the carefully prepared telegram to appellant and to the other banks mention or refer to banker's lien in any connection except with respect to cash balances.

This telegram, it must be remembered, was the second communication from appellees to the appellant bank; the first was the letter of January 15, 1931 (R. 203, 204), the major part of which has been hereinbefore quoted. The request in the receiver's telegram of the 16th and his letter of the 15th, was to restore the cash balance, notwithstanding "the undoubted right of offset". Appellee urged at the trial that the first part of the telegram from the receiver advising the bank that he was ordered by the Federal Court to take over all assets, including cash in banks, indicates somehow that his telegram was intended to apply to drafts and other items in the process of collection, as well as to cash balances. Had the receiver, a man of experience in the business world, intended this, he most certainly would have so stated in his telegram, and if he himself had failed to do so it is logical to assume that at least one or more of the twelve bankers who participated in the preparation of the telegram would have suggested, if such had been their intention, a request to the banks to refrain from any action directed against future collections. This request, it

can properly be inferred, was not intended, or was overlooked. In support of this conclusion, it is uncontradicted that the matter of the collection of foreign drafts was not mentioned by the receiver at his conference with the bankers. (R. 248.)

Instead of appellee's strained interpretation of the opening few words of the receiver's telegram of January 16th, it is submitted that the logical interpretation, and the one understood not alone by the appellant bank but by all of the other banks to which the telegram was sent is that, as receiver, Mr. McDuffie was requesting a restoration of *cash balances* then outstanding. Appellant's reply telegram announced nothing more than a compliance with this request. Its interpretation evidenced willingness to restore "the balance in checking account" and was apparently the same as that of all the other banks to which the telegram was sent. The Chemical Bank and Trust Co. telegraphed that it would "Restore Richfield's balance" (R. 212); the two Chicago banks wired that they would "Replace balances" (R. 212); the First Seattle Dexter-Horton National Bank telegraphed that it would "Release funds that were on deposit" (R. 213); the American Trust Company of San Francisco announced its willingness to transfer "balances" (R. 214); The Los Angeles Main Office of the Bank of America (Mr. Nolan's bank) sent a telegram stating that the "balance had been transferred" (R. 214); the Security First National Bank of Los Angeles wired that it had credited "$37,906.06 *balance* remaining in Richfield Oil Company account" (R. 214, 215), and followed this by a letter that the bank was

willing to transfer to the receiver *"balances"* to the credit of Richfield Oil Company (R. 215); The California Bank, Los Angeles, merely wired that it had acceded to the receiver's request. (R. 216, 217.)

The correspondence between the parties subsequent to the exchange of telegrams on January 16, 1931, evidences further their mutual intention to deal only with the Richfield cash balances then existing. Appellant confirmed its telegram of January 16th by a letter dated January 17th (R. 219, 220) wherein the telegram was incorporated in haec verba and which stated that:

> "* * * pending notification by you that all of the company's banks have restored to the receiver cash balances, we have taken no action towards *such* restoration on our part."
>
> (R. 220.)

On January 22, 1931, appellee telegraphed to appellant as follows:

> "All banks have now expressed their willingness to replace Richfield Oil Company's *offset balances* of January 15th to the credit of receiver (stop) Will therefore greatly appreciate your at once transferring such sums to my credit, advising me the amount by wire collect (stop) Wish express appreciation your cooperation as *these* funds will be of great assistance."
>
> (R. 220, 221.)

In reply to this telegram, appellant wired the receiver on January 22, 1931, as follows:

> "Answering wire have to-day placed to your credit Richfield Oil Company's *offset balance* of

January 15th, amount $40,874.77." (Italics ours in the foregoing quotation.)

(R. 221.)

This correspondence leaves no doubt about the nature of its subject. Mr. McDuffie intended only to procure a release of the funds then standing to the credit of Richfield Oil Company and he was satisfied with appellant's cooperation to this extent. His own testimony supports this, for on the witness stand he said:

"By the use of the words, 'all banks have now expressed their willingness to replace Richfield Oil Company's offset balances of January 15th, to credit of receiver', I meant the balances of January 15th. I did not refer to the collections in foreign countries that were not payable for many days thereafter."

(R. 277.)

Lest it be urged that appellant has not conducted itself equitably in its cooperation with the Receiver it should be noted that on January 22, 1931, as stated in its telegram of that date, appellant restored the sum of $40,874.77 to the credit of appellee. This cooperation, which will subsequently be more fully discussed herein, was continued by appellee until the early part of May, 1931. On March 5, 1931, the sum of $7749.58 was paid to appellee and between March 5, 1931, and April 22, 1931, the sum of $26,464.13, making a total amount paid to the receiver from the date of his appointment to the date of the institution of this action, of $75.088.48. If equities be projected into this

case, these voluntary restorations should be kept in mind.

Appellee would not have this Court believe that he intended to admit in his telegram of January 16, 1931, that appellant at that time was vested with a banker's lien upon the drafts in question, or, in other words, that there had been no waiver of lien by appellant in August and October, 1930, as hereinbefore discussed. Yet insistance by appellee upon his stand that by the wording of his telegram he was requesting a waiver of lien as to all foreign drafts as well as the cash balances places him in this position. For in his telegram, the following appears:

> "While you have undoubted right of offset * * *"

This statement without question was made with the $625,000.00 indebtedness of Richfield Oil Company to appellant in mind, and if the telegram is to be construed as applying to the foreign draft collections as well as the cash balances, it carries with it an admission that up to that time, at least, appellant had not waived its lien on the drafts. If appellee does not wish such a construction of his telegram, he is necessarily relegated to that which appellant contends is the only proper one, to-wit: that the parties were dealing only with the then existing cash balances. Again appellee's case must be impaled on either horn of a dilemma.

(2) Appellant by Its Telegram of January 16, 1931, Reserved Its Banker's Lien Upon All Foreign Drafts Then in Its Possession and the Proceeds Thereof.

> "We are holding certain collections as security for acceptances. Please understand that we con-

tinue to reserve all our rights for banker's lien against these collections."
(R. 210.)

This simple sentence from appellant's telegram precipitated an extensive argument by appellee's counsel at the trial to distort this express *reservation* of banker's lien on all Richfield's drafts held by appellant into a *waiver* of lien on the drafts here in dispute.

Appellee's theories upon which he founded his conclusion of waiver, and which he succeeded in impressing upon the Court below, have heretofore been summarized and need not now be repeated. Appellant cannot however refrain from again adverting to the artificiality of Appellee's position throughout this case and which now leads him to the ingenious but unconvincing conclusion that appellant bank reserved a lien only upon the drafts admittedly under the acceptances, and then only to the extent that their proceeds would be essential to liquidate such acceptances.

On appellee's theory that only part of the drafts were deposited under the acceptances, or on appellant's theory that all of them were, this interpretation of the telegram renders meaningless the words, "We continue to reserve all our rights for banker's lien against these collections". When informing the receiver that it was holding certain collections as *security* for acceptances, which it had an unquestioned right to do, there was no necessity for appellant further to inform the receiver that it continued to reserve its banker's lien against these collections, unless it intended to refer to the excess proceeds over and above the amount neces-

sary to liquidate the acceptances. It is submitted that the natural construction of this telegram, whether it was applicable, as appellee claims, only to the drafts admittedly under the acceptances, or to all of the drafts, is that a banker's lien for the general indebtedness of Richfield to appellant was reserved upon all proceeds of such drafts over and above the amount necessary to liquidate the acceptances outstanding.

Although the briefs submitted upon the conclusion of the trial are not before this Court, appellee will not deny that in his opening brief in the lower Court, he admitted that draft No. 103,012, drawn on Bueno y Cia, was deposited under the acceptance agreement, and that the excess proceeds thereof, in the sum of $469.06, were consequently properly appropriated by appellant to the satisfaction of Richfield Oil Company's note indebtedness, in accordance with the terms of the acceptance agreement. Also, appellee will not deny that Finding No. XV (R. 188, 189) was proposed by him and accepted by the Court without objection from appellant. This Finding embodies appellee's admission that draft No. 103,012 was deposited under the acceptance agreement and the proceeds thereof were therefore properly appropriated by appellant to the satisfaction of the general indebtedness of Richfield.

By appellee's own admission, then, his theory that appellant in its telegram of January 16, 1931, reserved a lien upon the drafts to which said telegram was applicable *only to the extent of the amount necessary to liquidate the acceptances,* is unsound. For, if his theory were correct, appellant had no right to the proceeds of draft No. 103,012. In passing, it will be

remembered that draft No. 103,012 was the one referred to at the beginning of this brief as having been included in appellee's complaint, but with respect to which appellee waived all rights at the trial on the ground that it was deposited under the acceptance agreement and consequently its proceeds were subject to application by appellant on account of Richfield's general indebtedness.

For the same reason the findings of the Court are inconsistent in this respect. Finding No. XIX (R. 190, 191) is an attempt to embody appellee's theory. Yet in Finding XV (R. 188, 189), as hereinabove pointed out, the Court found that the excess proceeds of draft No. 103,012, admittedly deposited under the acceptance agreement, were properly appropriated by appellant to the Richfield note indebtedness.

Having demonstrated, then, as appellant believes it has, that whatever the drafts were to which the reservation in appellant's telegram of January 16th was applicable, this reservation was not limited to the amount of the proceeds of the drafts necessary to liquidate the acceptances, but also extended to the excess of such proceeds, it is now necessary to ascertain to just what drafts this reservation applied. Appellant's position is that this reservation was intended to and did apply to all Richfield drafts which it then held.

Appellee seized upon the word, "certain", in appellant's telegram, arguing that its use was proof that appellant only intended to reserve a lien upon the drafts which were admittedly deposited under the acceptance agreement, and that by failing to mention

those which appellee claims were not under agreement, appellant waived its lien thereon. The word, "certain", appellee argued, citing Webster's Dictionary, means "some among others". Appellee thereupon conveniently concluded that the "some" were the drafts admittedly under the acceptance agreement, and the "others" were the drafts here in dispute.

Assuming that appellee is correct in his definition of the word, "certain", the fundamental difficulty with his argument, from the standpoint of construction, is that there is nothing in the telegram which shows what the "certain" drafts were to which appellant referred. Appellee has gratuitously assumed that they were not the drafts involved herein. However, for all that can be gathered from the evidence appellant might just as well have been referring to the drafts here in dispute as to any others. Appellee's conclusion is pure speculation. Furthermore, on appellee's interpretation the telegram might fairly be construed as meaning "We are holding *your* collections among the many we have as security for acceptances".

But appellant was obviously referring in its telegram to all of the drafts which it then held for Richfield Oil Company. It is common knowledge that the word "certain" is very often used as a synonym for "all", or even "various", just as it may be used to mean (as appellee claims) "some among others"; in nine cases out of ten it can be eliminated as so much surplusage without robbing language of its true and intended meaning. To illustrate by example:

"We have certain (various) books of yours";
"We are disposing of certain books of Smith in

our possession" ("all books of Smith in our possession"); "There are certain reasons" (surplusage); "Certain people you know were there" (descriptive and surplusage).

That words in a contract are to be construed in their popular and accepted meaning, see: *Scudder v. Pierce* (1911), 159 Cal. 429, 114 Pac. 571, where the Court said, at page 433:

> "The second consideration is that all parts of a contract are to be given effect if this may be done without doing violence to the manifest expressed intent of the parties, and that the terms of a contract are to be construed according to the ordinary and usual acceptation of the language, unless an intent that they should be construed otherwise plainly appears."

In *Retsloff v. Smith,* 79 Cal. App. 443, 249 Pac. 886, the following is stated, at page 452:

> "The purpose of all construction is to ascertain the intent of the parties. When the intent of the parties is ascertained it must always take precedence over the *literal sense of the terms.*" (Italics ours.)

It was argued that the other bank creditors of Richfield Oil Company, because of the use of the word "certain", understood this telegram as a waiver of appellant's lien. To say that the other bank creditors recognized any such refinement is obviously erroneous. There is no evidence in this case that they or any of them were aware of the nature of any agreement or agreements between Richfield Oil Company and appellant as to the foreign drafts—either the alleged agree-

ments upon which appellee bases his contention herein, or the agreement as understood by appellant. The record is equally silent as to what, if indeed any, interpretation the other bank creditors placed upon this telegram. To appellant, it is quite apparent that the bank creditors, if they thought about this telegram at all, accepted it in the ordinary sense of the language used: "We will return the bank balance, but we reserve our rights against the foreign collections." The action of Security First National Bank of Los Angeles in relinquishing draft proceeds to appellee (R. 335) was cited as proving that the other bank creditors understood that appellant waived its lien upon the drafts in question. Appellant does not know what motivated the Security Bank in taking this action, but in any event the construction which it placed upon its own agreement with the receiver can have no bearing on the proper interpretation of appellant's telegraphic communication to the receiver. Furthermore, the Security Bank made no reservations whatever in its telegram to the receiver. (R. 214, 215.)

Appellee seeks somehow to penalize appellant because in its telegram it used the word "continue", to-wit: "We continue to reserve our rights * * *". What argument can possibly exist as to the use of this word? Obviously what was said and what was meant was that "Notwithstanding our restoration of your bank balance, we are holding your collections as security for acceptances and inform you that we *continue* to reserve our rights to banker's lien, notwithstanding our action in restoring your balance". The right existed prior to the sending of the telegram, if it existed at all, and the bank *continued* to reserve that right.

In *Balfour v. Fresno Canal & Irrigation Co.* (1895), 109 Cal. 221, 41 Pac. 876, the Supreme Court of California uses, at page 227, the following apt language:

> "It is a true and important rule of construction that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done."

Applying this sensible and usual rule of construction, it is submitted that an examination of appellant's telegram as a whole leads but to one conclusion—that appellant reserved its lien upon all Richfield drafts then held by it. Any other construction would be absurd and would totally destroy and render meaningless the words contained in the telegram: "Please understand that we continue to reserve all our rights for banker's lien against these collections".

The following quotation from *Sprague v. Edwards* (1874), 48 Cal. 239, at page 249, fittingly concludes this phase of the argument:

> "It is not the practice of Courts of Justice to divest persons of their estates by a strict interpretation of the language of an instrument when the sense in which the words were used is apparent from other portions of the instrument, viewed in the light of attending facts."

(3) The Circumstances Surrounding the Sending of Appellant's Telegram Prove That no Waiver of Lien on the Drafts in Question Was Intended.

Mr. Eisenbach, the chief credit officer of appellant, and a man to whom, obviously, consideration of the

lien of a bank or its right to offset was not a new subject, received Mr. McDuffie's telegram (R. 452) and sent the reply which appellee here calls into question. (R. 452, 453.) Prior to sending the telegram Eisenbach had been advised by Mr. Hellman, Vice-President, in charge of the Foreign Department (R. 441) that there were drafts and foreign collections of Richfield Oil Company in the Foreign Department. (R. 453.) Mr. Eisenbach prepared the telegram jointly with Mr. Motherwell, a Vice-President of the Bank, writing it at his desk and conferring with him about it. (R. 453.) The telegram was sent in direct reply to appellee's telegram. (R. 458.) Mr. Motherwell testified that he had been Vice-President of Wells Fargo Bank & Union Trust Co. for over five years (R. 460), and prior to that time was with the Federal Reserve Bank for a period of eight years as assistant examiner in San Francisco, managing director of the Salt Lake City Branch and manager in Los Angeles. (R. 460.) He testified that he had had experience with banker's lien and had a definite understanding as to what it was (R. 461); that he was possessed of this information and knowledge at the time of the sending of the telegram; that he knew from Mr. Hellman of the Foreign Department about the Richfield drafts and collections (R. 461), and that with all of this knowledge before him he, jointly with Mr. Eisenbach, prepared the telegram. (R. 462.)

These circumstances materially strengthen appellant's position as to the very obvious meaning of the language used in the telegram, for the manner in which the telegram was sent, the consideration given to it,

proceeds of the drafts as an absolute violation of the agreement with him and the banks (R. 244), and on cross-examination he emphasized his statement by saying, "My recollection is rather clear because the matter was of extraordinary importance." (R. 225.) Mr. Eisenbach testified as to the exact nature of the conversation between him and Mr. McDuffie, and he quoted Mr. McDuffie as saying:

> "I have just received notice that the bank has applied $145,000.00 on its lien, *I am aware that you have reserved that right by your telegram of January 16th,* and now you have exercised the lien, I don't think it is playing cricket."
>
> (R. 453.)

This testimony is supported by that of Mr. McDuffie on cross-examination, in which he said:

> "In substance, I stated to Mr. Eisenbach that I knew there had been a reservation of rights, but I had not expected the bank to exercise these rights."
>
> (R. 226.)

After testifying on cross-examination that he writes shorthand and makes contemporaneous memoranda of important conversations (R. 454, 455), Mr. Eisenbach stated that there was a means of determining the exact date of the telephone conversation with Mr. McDuffie. (R. 456.) At this point in the testimony, the record shows (R. 456) that counsel for appellant tendered to counsel for the receiver Mr. Eisenbach's memorandum of May 11th.

Returning then to the question as to what was Mr. McDuffie's understanding of appellant's telegram of

January 16th, appellant believes that it can answer this question more accurately than Mr. McDuffie did upon the witness stand. Mr. McDuffie understood the telegram as the consent of appellant to do what he requested it to do, namely, to restore the bank balance against which it had previously exercised its banker's lien, and he further understood that telegram, as he subsequently stated to Mr. Eisenbach on May 11, 1931, as reserving appellant's banker's lien against all Richfield's collections in the Foreign Department. On his own testimony he could have had no other understanding. He did not know the details of the transaction; he did not know the provisions of the acceptance agreement; he did not know the amount of the indebtedness on acceptances. He knew and this, we submit, is all he knew, that money had been borrowed upon acceptances secured by drafts deposited for collection with Wells Fargo Bank & Union Trust Co. He did not show appellant's telegram to his counsel, nor did he ask appellant for any explanation of it. He was anxious at that time to get under way with his receivership; he wanted the cash balances restored; he was not then worrying about the future; he desired to reassure each bank that all of them had agreed to the request set forth in his telegrams of January 16th (R. 209); he was not concerning himself, nor was he going to bother the other banks with this reservation of appellant; that, thought Mr. McDuffie, if he thought about it at all, would take care of itself in the future.

(5) Effect of Appellant's Action in Releasing Draft Proceeds to the Receiver.

Appellee further claims that appellant's conduct after the transmission of its telegram of January 16th has evidential force adverse to appellant on the question of waiver of lien. Appellee's contention in this respect is that the subsequent relinquishment by appellant to the receiver of some of the draft proceeds is evidence confirming the interpretation which appellee places on appellant's telegram of January 16th. The trial Court found that the proceeds of foreign drafts were deposited by appellant bank to the credit of Richfield Oil Company and/or its receiver without any claim of right of offset or banker's lien on the part of appellant (Finding XXIII, R. 193), and concluded that, by its agreement and by its conduct subsequent to the deposit of drafts, appellant waived its banker's lien. (Conclusion IV, R. 194, 195.)

Appellee does not and could not under the authorities contend that the relinquishment by appellant of some of the draft proceeds in and of itself was a waiver of appellant's security or lien right as against the balance of the collections in its possession or under its control. In *Bell v. Hutchinson Lumber Co.* (1928, W. Va.), 145 S. E. 160, the directors of a corporation personally paid deficiency income taxes of the corporation under an agreement that they would be entitled to an equitable lien upon the proceeds of the sale of certain timber. The proceeds of this sale were deposited in a bank. The directors

caused part of the proceeds to be applied to other indebtedness of the corporation. The defendant, who claimed the fund under a garnishment, contended that this action of the directors amounted to a waiver of their lien upon the fund. The Court, in holding against this contention, said at page 165:

> "This fact would not impel a conclusion of waiver or abandonment of the lien by appellants * * * The intent to waive or abandon a lien must be shown by clear and convincing proof."

Appellant honestly believes that appellee's interpretation of its telegram of January 16th is so unnatural and illogical that no act of appellant could possibly have confirmed it. With equal seriousness appellant contends that its action in returning the funds subsequent to the appointment of the receiver was consistent with both the original right it claimed and the right reserved in the telegram of January 16th.

Upon Mr. McDuffie's appointment, appellant exercised its banker's lien against Richfield's bank balance, in excess of $40,000.00. Thereafter appellant agreed to cooperate to the extent requested by the receiver, viz.: by restoring the bank balance; but it warned the receiver by its reservation of rights in its telegram of January 16, 1931, that it might not cooperate in the future with respect to the collections in its Foreign Department. Subsequent to the receivership, Mr. Eisenbach was delegated to keep in close contact with its affairs and endeavored to do so. (R. 254.)

It cannot be disputed that, according to the information and belief of Eisenbach, and through him, of appellant, there were several periods in the course of the receivership during which its condition appeared more serious than at other times. The situation appeared most serious to Eisenbach and appellant in the month of February and in the month of May, 1931 (R. 454, 459); reports as to the condition of the company at these times were made by Mr. Eisenbach to Mr. Motherwell, Vice-President, and to Mr. Lipman, President, of appellant bank. (R. 454.) In May, 1931, Eisenbach believed that bankruptcy of Richfield was imminent. (R. 454.) Counsel for appellee sought vainly to destroy the effect of this testimony by asking who threatened bankruptcy and whether it was not a fact that bankruptcy did not actually occur. To this line of questioning, Eisenbach replied:

> "I did not testify that anybody made a threat of bankruptcy. I said I thought bankruptcy was impending."
>
> (R. 457.)

And further:

> "I have not attempted to say that anybody told me that Richfield Oil Company would be put into bankruptcy. My judgment told me that there was a danger of bankruptcy."
>
> (R. 457.)

Whether bankruptcy was or was not imminent, it was Eisenbach's belief that it was, and he so reported to appellant bank.

The substance of Eisenbach's testimony was actually confirmed by Mr. McDuffie, who stated on the witness stand:

> "There were two acute periods in the money affairs of the receivership, one in February and one in May."
>
> (R. 230.)

In May, the acuteness was caused by the necessity of raising money to pay property taxes, and in February the question of gasoline taxes was involved. (R. 123, 124.)

These dates and the changeable financial condition of Richfield Oil Company are important in adding reason to the conduct of appellant in returning draft proceeds to appellee. Bearing in mind the times when the financial situation was most acute and remembering that Mr. Eisenbach was keeping in touch with the affairs of Richfield, meanwhile reporting to Mr. Motherwell and Mr. Lipman, it is quite natural that the two periods when appellant indicated its intention to exercise its reserved right as against the draft collections were in February and May. On February 26, 1931, Mr. Gilstrap of appellant bank wrote a letter to the receiver wherein he stated:

> "The remainder of the proceeds, totalling $7749.58, we are holding in accordance with the notice given you by our wire of January 16."
>
> (Plaintiff's Exhibit 107, R. 303, 304.)

In reply to this letter, appellant received the following telegram:

"Los Angeles Calif 248P Mar 2 1931

WFBATUCO

Attn W. J. Gilstrap

Please repeat telegram dated January sixteenth mentioned in your letter to Lyons of February sixth please answer immediately

RICHFIELD OIL CO OF CALIF

POPE."

(R. 306.)

Appellant then by wire repeated its telegram of January 16, 1931.

Thereafter appellant received a letter from Mr. McDuffie dated March 3rd, referring to the previous communication of February 26th, and stating in part:

"I beg to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15, 1931, to the credit of William C. McDuffie, receiver. *I will therefore appreciate it* if you will kindly credit the remainder of the proceeds as mentioned above, $7,749.58, to the credit of Richfield Oil Company," etc. (Italics ours.)

(R. 302, 303.)

In response to the last communication, appellant, on March 5, 1931, wrote a letter to appellee, stating in part:

"In accordance with *your request,* we are crediting the account of William C. McDuffie, receiver Richfield Oil Company of California, with the sum of $7,749.58." (Italics ours.)

(R. 305, 306.)

The first letter hereinabove set forth sent by appellant to appellee on February 26, 1931, is in line with the knowledge by appellant that in February the condition of the receivership was acute. However, the ultimate relinquishment of the draft proceeds squares with Mr. McDuffie's testimony that by the latter part of February the financial condition of the receivership was no longer as acutely serious as previously. (R. 230.) In this connection, Mr. Gilstrap testified that prior to sending the letter of relinquishment, there was considerable discussion among the officers of the bank. (R. 409).

It should be noted that in the receiver's letter of March 3, 1931, he did not make a *demand* but a *request* in the language, "I will therefore appreciate it." As a reason for his request, the receiver stated that all of the banks had transferred their balances; in other words, he urged appellant not to *exercise its right.* At the trial, counsel for appellee demanded that the language of every letter and every communication by appellant be strictly construed to the prejudice of appellant. If the same yardstick be applied to this letter from Mr. McDuffie, we find, notwithstanding the statement in appellant's letter of February 26, 1931, that it was holding proceeds "in accordance with the notice given you by our wire of January 16" (R. 304), and notwithstanding that the receiver had before him, at his own request, a copy of that telegram of January 16th (R. 307), there is no attempt to deny in the receiver's letter of March

3d that the action of appellant in holding the proceeds was "in accordance with the notice given you by our wire of January 16." The receiver apparently accepted this, as appellant contends, he was required to do.

The letter of the receiver stated that he would appreciate the crediting of the proceeds to his account. With this request before it, appellant determined upon a course of conduct after due and deliberate consideration. Mr. Hellman testified that after the receipt of this letter, he conferred with Mr. Lipman with reference to the subject matter of the letter and of the reply to it. He further testified:

> "I had a conference with officials of the bank with respect to handing back this particular lot of proceeds. At that time the Cities Service Company had just recently made an offer for 500,000 shares of Richfield common stock at $4.00 a share, and was very much interested in the purchase of the company, and it was decided between Mr. Lipman and myself that the money would be returned. Prior to transmitting the proceeds back to Richfield Oil Company, as stated in the letter which is Plaintiff's Exhibit 108, there was a conference held between me and Mr. Lipman with reference to the subject matter of the letter which was subsequently written, and at that time there were facts known to me and to Mr. Lipman to the effect that the receivership of the Richfield Oil Company was in fair probability of being able to work itself out."
>
> (R. 441, 442.)

Thereupon appellant's letter of March 5, 1931 (Plaintiff's Exhibit 108, R. 305, 306), was written, returning the sum of $7749.58 and the further sum of $11,081.52, proceeds of a draft which meanwhile had been received.

From the foregoing it is quite apparent that the facts do not sustain the argument made by counsel for appellee at the trial to the effect that when appellant received appellee's letter of March 3, 1931 (R. 302, 303), it readily concluded that the receiver was entitled to the funds and that it had no claim against them. The facts are just to the contrary, for the transfer was made after due consideration of the financial condition of Richfield Oil Company and of the question as to whether appellant bank's cooperation should continue.

The condition of the receivership again changed for the worse in May, 1931. The 180 day Birla Bros. drafts matured in the early part of the month. On May 8th, Hall telephoned to Gilstrap inquiring as to the cost of cabling the proceeds of these drafts from Calcutta. (R. 386, 387.) Thereafter, Richfield wrote a letter requesting that the proceeds be transmitted by cable. (R. 310.) Meanwhile, on the same day, Gilstrap reported to Hellman that Hall had telephoned about the proceeds. (R. 387.) As a result of this conference, Gilstrap telephoned back to Hall, telling him that "the bank had decided to take the proceeds of the two Birla Bros. drafts deposited on October 8th, and apply them against Richfield's indebtedness." (R. 387.)

Meanwhile, there had been numerous conferences at appellant bank, participated in by Hellman, Motherwell, Eisenbach and Lipman, with respect to the exercise of its lien by the bank. Lipman specifically stated on the witness stand that there was no discussion as to the bank's *right* to exercise the lien, but that there were discussions as to procedure (R. 450); Motherwell testified to the same effect. (R. 460, 461.)

It is submitted that the only inference which may fairly be drawn from the relinquishment by appellant to appellee of the proceeds of some of the Richfield drafts is that appellant was cooperating with the receiver during the period when it thought that cooperation was advisable, to the extent and for the time that in its best judgment it thought proper. It withheld making a final decision against appellee until the very end, cooperating, meanwhile, to its own loss, but secure in the just belief that it had notified appellee of what it ultimately might do (and subsequently did) by the reservation in its telegram of January 16th. That appellant understood this telegram as reserving a lien on all Richfield foreign drafts cannot be questioned in the light of its letter of February 26, 1931, in which it informed Richfield of its intention to hold the proceeds of the designated drafts in accordance with its said telegram. The existence of this letter emphasizes the subsequent relinquishment of draft proceeds as cooperation with the receiver.

If the source of these proceeds be examined, conclusive proof is found that the relinquishment thereof to appellee is meaningless in connection with the ques-

tion of waiver of lien. The first sum of $7749.58 released to the receiver consisted for the most part of proceeds of drafts claimed by appellee not to have been deposited under the acceptance agreement, to-wit, drafts Nos. 113,009, 113,018 and 123,008. (R. 303.) In an earlier part of this brief appellee's claim that these drafts were not deposited under the acceptance agreement was presented and considered. But also included in this sum were the proceeds of a part payment on draft No. 103,012 (drawn of Bueno y Cia) (R. 303, 304), which, as previously noted, appellee admitted, and the Court found, was deposited under the acceptance agreement. (Finding XV, R. 188, 189.) On appellee's own interpretation of appellant's telegram of January 16, 1931, that a lien was reserved only upon those drafts which appellee claims were deposited under the acceptance agreement, the inclusion of the proceeds of draft No. 103,012 in the amount credited to the account of the receiver renders the relinquishment thereof, if of any probative value on the question of waiver of lien, evidence against appellee's interpretation, in that appellant thereby relinquished to the receiver funds from a draft which appellee admits was deposited under the acceptance agreement and against which a lien had undisputedly been reserved.

In addition to appellee's argument that the relinquishment by appellant of these draft proceeds gives some support to his interpretation of appellant's telegram of January 16, 1931, appellee likewise seizes upon this relinquishment to support his argument that a waiver was effected at the inception of the foreign

draft transactions in October, 1930. The lower Court accepted this argument in its opinion. (R. 177, 187.) Here again, it is submitted, that the relinquishment can mean nothing, except possibly to rebut appellee's contention, in the face of the fact that an installment of the proceeds of draft No. 103,012 received in May, 1931, are admitted to have been properly applied to the liquidation of Richfield's general indebtedness to appellant. To be more specific, *appellant relinquished the proceeds of a draft upon which appellee admits appellant had an enforceable lien,* as well as the proceeds of drafts upon which appellee alleges the lien was waived. How can this action, then, be confirmatory of an understanding on the part of appellant that it at any time waived its lien upon the drafts, the proceeds of which are here in dispute?

(6) The Effect of the Claims Filed by Appellant Bank in the Receivership Proceedings.

On the 28th day of March, 1931, appellant herein filed its Proof of Claim in the receivership proceedings. This proof of claim set forth the fact that Richfield Oil Company of California was indebted to appellant in the sum of $636,189.95 for moneys loaned to Richfield and that this indebtedness was evidenced by a promissory note dated July 12, 1930. It also recited that no securities were held by claimant for said indebtedness. (R. 366, 367.) A further proof of claim was filed by appellant for the additional sum of $1028.85 for services rendered as registrar of Richfield's preferred and common stock. This claim likewise stated that no securities were held by claimant for said indebtedness. (R. 367, 368.)

Appellee, applying the same argument to these claims as he did to the relinquishment of the draft proceeds, contended that the allegation that the claims were not secured was illustrative of the understanding of appellant that by its telegram of January 16, 1931, it waived its banker's lien upon the drafts in dispute. At the trial, it was expressly admitted by counsel for appellee, and will no doubt be similarly conceded here, that these proofs of claim in and of themselves would not operate as a waiver of appellant's lien or right of setoff. In view of this concession it is unnecessary to cite from the long line of cases holding that failure to allege the existence of security in a claim filed in an equity receivership does not act as a waiver of the security.

The circumstances surrounding the filing of the claims show that it was entirely through inadvertence that they did not recite that the drafts in question were security for the general indebtedness of Richfield to the bank.

On March 14, 1931, appellant sent a letter to Heller, Ehrman, White & McAuliffe, its attorneys, requesting that they prepare a claim in the receivership proceedings covering this indebtedness of Richfield to appellant. (R. 463.) The attorneys prepared the claim and by letter of March 27, 1931, forwarded it to the bank for signature by the proper officer. (R. 463.) On the same date the attorneys sent to appellant a claim against the receiver for services rendered as registrar of Richfield's preferred and common stock. In none of this correspondence between the bank and its attorneys was the question of security discussed.

It should be remembered that appellant is a comparatively large San Francisco bank engaged, through various departments, in the manifold activities of a modern bank and trust company. The employee in the Note Department who requested counsel to prepare these claims was unaware of the existence of the collections in the Foreign Department. Furthermore, it is apparent that the attorneys inadvertently failed to question the officers of appellant as to the existence of any security. Additional proof of inadvertence on the part of appellant is found in the fact that the claim for the note indebtedness was signed by F. I. Raymond, Vice-President and Cashier of Wells Fargo Bank & Union Trust Co. In the entire record of this case, this is the only time that Mr. Raymond's name appears. It is clear that he had nothing whatever to do with, and consequently no knowledge of, the foreign draft collections of Richfield. The proof of claim for services as registrar was signed by A. J. Callahan, Assistant Trust Officer of appellant, and this is the only time that his name appears in the entire record of the case. It is obvious that as Assistant Trust Officer he would be ignorant of the collections in the Foreign Department.

Thereafter appellant by order of Court was allowed to file an amended proof of claim. (R. 464, 465.) This amended claim alleged that the information for the first claim had been compiled by the Note Department of appellant bank which was a separate department from the Foreign Department; that said Note Department had no records of collateral or other security deposited with the Foreign Department; that through

inadvertence and lack of knowledge of the Note Department, said Richfield claim stated that there were no offsets or counterclaims to the debt set forth in said claim, and that no securities were held by the claimant for said indebtedness; whereas, the facts were that unknown to the Note Department the drafts and the proceeds thereof involved in this litigation were held in the Foreign Department as security for all of the Richfield indebtedness. (R. 465.)

It is submitted that if the first proof of claim filed by appellant might otherwise have had some probative force, the amended proof is cogent evidence as to exactly what the understanding of appellant was, and operates completely to nullify the contentions of appellee based on the first proof of claim.

No effort was made to amend the comparatively small claim for services as registrar, but this can have no bearing on the issues involved herein since appellant is only holding the proceeds of the drafts as against the general note indebtedness of Richfield Oil Company to it.

It is submitted that the inadvertence or the carelessness of appellant and its counsel in the preparation of its proofs of claim should not be considered by the Court as in any way prejudicial to any substantive rights which appellant possessed. This case, it is respectfully urged, involves conflicting claims to a large sum of money and substantial legal and equitable rights. It should be determined upon the merits, unaffected by excusable inadvertence in the preparation of documents.

(b) As a Matter of Law, Appellant Did Not Waive Its Lien Subsequent to the Appointment of the Receiver.

(1) The Telegram is Silent as to Waiver of Lien.

Despite all of the labored reasoning which counsel for appellee offer in support of their position that appellant in its telegram of January 16, 1931, waived its banker's lien, there is one vital weakness in this position which renders all of such reasoning futile. This is the fact that nowhere in said telegram can there be found any statement that appellant intended to waive its lien—not even ambiguous language to that effect.

Appellee's legal position in this regard has been that since, according to his contention, appellant reserved its lien only upon the drafts admittedly deposited as security for acceptances, as a matter of law it waived its lien upon all other drafts by failing to assert it. This proposition is unsupported by decisions of any Courts, but on the contrary is negatived by the authorities which will hereinafter be cited.

Appellee sought in the lower Court to sustain his position by the citation of the very early case of *Brown v. Gilman* (1819), 4 Wheaton 255, particularly the language of the Supreme Court at page 289:

> "The express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of that lien to any greater extent."

Although this quotation has a specious bearing upon the issues involved herein, an analysis of the facts in the case cited completely robs it of any value as support for appellee's contention.

In *Brown v. Gilman* certain real property was sold, the vendor well knowing that the purchase was for the purpose of resale. The seller claimed an equitable vendor's lien upon the property, and the question was whether, assuming that the law recognized such a lien, the vendor had waived it in the agreement of sale. The contract contained an express stipulation that the property should remain liable for the first payment but that separate security should be taken for the residue of the purchase money. This agreement, of course, strongly indicated an intention to waive a vendor's lien for the balance of the price. The conclusion that such was the intent was as inescapable as if there had been an express waiver. It is impossible to contend logically that there is any parallel between this agreement and that involved in the case at bar. And more important, the reservation to a specified extent and the equivalent waiver to the greater extent, applied in the cited case to *exactly the same property.* Appellee would have this Court believe that a reservation of a lien upon one property item is a waiver of lien upon other property where there is a contemporaneous failure to assert the lien upon the latter. There is no authority for this. It is, moreover, unfounded in law, for, assuming that appellee is correct in his argument that not all of the drafts were deposited under the acceptance agreement and that the reservation in the telegram of January 16, 1931, referred only to those drafts which actually were so deposited, nevertheless, the circumstances did not impose any *obligation* or *duty* on the part of appellant to come forward on January 16, 1931, and expressly

reserve its lien upon the drafts which, according to appellee's contention, were not deposited under the acceptance agreement.

The only rule of law which in any manner approaches that for which appellee here contends provides that assertion by the lien holder of a title to the property inconsistent with the lien, effects a waiver of the lien. For instance, if the lien holder asserts that he has full title to the property he thereby waives his lien. See *Williams v. Ashe* (1896), 111 Cal. 180, 43 Pac. 595; *Sutton v. Stephan* (1894), 101 Cal. 545, 36 Pac. 106.

It is hardly necessary to comment upon the absence of any statement in the telegram in question inconsistent with the existence of a lien on the drafts involved herein.

A. Appellee has the Burden of Establishing the Alleged Waiver.

The burden rests upon appellee to show to a certainty that appellant, after the appointment of the receiver, waived its right to banker's lien.

In *Aronson v. Frankfort Ins. Co.* (1908), 9 Cal. App. 473, 99 Pac. 537, the Court said, at page 480:

> "A waiver in law is the intentional relinquishment of a known right; and the burden is upon the party claiming such waiver to prove it by such evidence as does not leave the matter doubtful or uncertain."

So likewise in *Mott v. Cline* (1927), 200 Cal. 434, 253 Pac. 718, at page 451 the Court said:

> "The burden is on the party asserting a waiver to introduce evidence of the facts constituting it."

Not only does the burden of proving that appellant waived its lien rest upon appellee, but the law presumes that appellant did not intend such waiver. Appellee may overcome this presumption only by clear and convincing evidence to the contrary. The record is totally lacking in such evidence.

In *Rader v. Starr Milling & Elevator Co.* (1919), 258 Fed. 599, 606, the following language appears:

> "The legal presumption is that one who has a legal and equitable lien on property intends to maintain and enforce it and his abandonment thereof may not be adjudged without clear and convincing evidence of his intention to abandon."

In *McBride v. Beakley* (1918, Tex.), 203 S. W. 1137, 1138, the Court said, quoting from Ruling Case Law:

> "To sustain this loss of lien (that is by waiver) it must be placed on one or the other of two ideas; intentional waiver or from the loss of possession. As to the first, authority is abundant to show that *one will not be held to waive a lien unless the intent be expressed or very plain and clear; the presumption is always against it.*" (Italics ours.)

Exactly the same language appears in

> *Lambert v. Micklass* (1898 W. Va.), 31 S. E. 951 at page 952;

and in

> *Rosenbaum v. Hayes* (1901 N. D.), 86 N. W. 973, at page 980.

In *Slide v. Spur Gold Mines & Seymour* (1894), 153 U. S. 509, 517, the Court, in speaking of the waiver of a vendor's lien, said:

> "An intent to abandon it is not to be presumed, and while, of course, like any other right, it may

> be abandoned or waived, the evidence of an intent to so abandon or waive should be clear and satisfactory."

In *Adams v. Harvey* (1924, Wash.), 225 Pac. 407, it was claimed that plaintiff had contracted not to exercise a lien. At page 410, the Court said:

> "In several cases we have held that there was a waiver of the right of lien, but in each instance the waiver was specific and no reasonable doubt could exist as to what was meant. * * * *We would not be justified in holding that a claim of lien has been waived unless we can say that it was clearly understood between the parties that such should be the case."*

To the same effect see *Treeman v. Frey* (1929, Okla.), 282 Pac. 452.

The cases previously cited with reference to the waiver of mechanics' liens are equally applicable here. Likewise, the cases last cited apply with like effect to the question of whether appellant waived its lien at the inception of the foreign draft collection business in August, 1930, and, it is submitted, preclude the interpretation placed by appellee upon Mr. Hall's instructions.

In light of these cases, how can it be successfully maintained that appellant waived its lien in the telegram of January 16, 1931, especially in view of the fact that there is no statement in said telegram inconsistent with the retention of such lien? The Court's attention is particularly invited to the italicized portion of the quotation from *Adams v. Harvey,* the case last quoted. When the conclusion that appellant waived

its lien can be reached by counsel for appellee only through the subtle mental processes to which counsel have resorted, it is certainly improper to state that "it was clearly understood between the parties" that the lien was to be waived.

It was further contended by appellee at the trial that if appellant's theory that all drafts were subject to a contractual lien under the terms of the acceptance agreements is correct, appellant, in reserving its banker's lien in the telegram of January 16, 1931, reserved something it did not possess, and consequently waived its right to a contractual lien through failure to assert the same. The arguments heretofore advanced and the cases cited are equally applicable to this contention. The banker's lien would be no greater in extent than the contractual lien; consequently there was no inconsistency in the reservation of a banker's lien if, as a matter of fact, the lien right was contractual. And again, it is submitted that under the authorities hereinbefore cited, waiver of lien, created by contract or by operation of law, does not result from a mere failure to assert it. Furthermore, the evident intention of the framers of the telegram in question was to reserve security, whether this be technically called banker's lien or contractual lien. The use of the technical words "banker's lien" must give way to the evident intention. The following quotation from *In re City and County of San Francisco* (1923), 191 Cal. 172, 177, 215 Pac. 549, is here pertinent:

> "The object to be obtained is, of course, the principal factor of consideration in the construction of contracts."

See also *Van Slyke v. Arrowhead, etc.* (1909), 155 Cal. 675, 102 Pac. 816.

(2) There Was no Consideration for the Alleged Waiver of Lien.

It will be assumed for the purposes of this part of the argument that appellee and the Court below are correct in their construction of the telegram of January 16, 1931. But even adopting their interpretation the telegram would amount merely to an executory promise to waive the lien as to all proceeds of drafts which were not included in the sum which on that date was actually transferred to the account of the receiver. The question which naturally follows is: Where is the consideration for such promise of waiver?

An essential element of an effective waiver of lien, or a waiver of any rights, is the support thereof by a sufficient consideration.

In *Clark v. Costello* (1894), 29 N. Y. Supp. 937, the Court said, at page 940:

> "The referee finds that the defendant promised the plaintiff to ship the machine from Amsterdam to the plaintiff at Elmira. Assuming this to be sustained by the evidence, it would not necessarily follow that there was a waiver of the lien. It has been held that an agreement to give up a lien, in order to be obligatory, must be based on a legal consideration."

In *Abbott v. Nash* (1886, Minn.), 29 N. W. 65, the following language appears at page 67:

> "The writing which is claimed to waive or release plaintiff's lien right, does not appear to be supported by any consideration and is therefore ineffectual."

In *Smith v. Minneapolis Threshing Machine Co.* (1923, Okla.), 214 Pac. 178, the Oklahoma Court stated, at page 180:

> "A waiver, to be operative, must be supported by an agreement founded upon a valuable consideration."

In *Bronson v. Northwestern Mutual Life Insurance Co.* (1921, Ind.), 129 N. E. 636, 640, it was held that:

> "There is no claim of a waiver before April 4, 1916, and thereafter there could have been in this case no waiver by agreement, for at the time of the act of appellee in sending the notice, the insured was not living, and there could have been no agreement with him; further there was no consideration for a waiver by agreement. It must appear that it was the intention of the parties so to waive, and that such waiver by agreement was supported by sufficient consideration."

To the same effect see:

Reynolds v. Detroit Fidelity & Surety Co. (1927), 19 Fed. (2) 110;

Davis v. Standard Accident Ins. Co. (1929, Ariz.), 278 Pac. 384;

Jobst v. Hatten Bros. (1909, Neb.), 121 N. W. 957;

Western National Bank of Hereford v. Walker (1918, Tex.), 206 S. W. 544;

Propst v. Haulley Co. (1919, Ore.), 185 Pac. 766;

Crocker v. Page (1924), 206 N. Y. Supp. 481.

Any claim that the consideration for this supposed promise may be found in the promise of the other

banks to turn over their Richfield accounts and the subsequent actual transfer thereof, is unsound. The record is barren of any agreement made by appellant with any other banks to transfer their Richfield accounts. All negotiations upon which any legal results may be predicated were conducted directly with the receiver through the medium of the telegrams hereinbefore mentioned. This is clearly established by reference to these telegrams. At the expense of repetition, the pertinent part of appellee's telegram to appellant is quoted again:

> "As receiver I am ordered by Federal Court to take over all assets including cash in bank stop While you have undoubted right of offset, such right if exercised will seriously cripple receiver's operations Local banks have indicated they will acquiesce in this program."

This is a request directly from the receiver. It contains nothing to the effect that the other banks would promise to transfer their accounts if appellant would agree to do likewise.

The recital in the telegram of the acquiescence of the other banks is merely a statement of a fact placed therein for whatever persuasive effect it might have upon appellant. It does not amount to an offer on the part of the other banks to transfer their accounts if appellant would transfer its account.

Appellant's reply telegram was sent directly to the receiver, and its terms were not addressed expressly or impliedly to any one else. The pertinent part of this telegram is as follows:

> "Replying telegram we are willing to restore into your name as receiver Richfield balance in checking account provided we are notified by you that all company banks have taken similar action * * *."

The last part of this telegram, commencing with the word "provided", does not purport to be a promise or an offer to the other banks or an acceptance of any offer from them. It is merely a statement of a condition precedent to action on the part of appellant, addressed to appellee as receiver.

Giving appellant's telegram the construction (that is, as a promise to waive the lien) contended for by appellee, it still would amount only to an offer to *appellee.* It is elementary that an offer made to a particular person may be accepted by him alone, and becomes a contract only if accepted and supported by legal consideration.

> *Boston Ice Co. v. Potter* (1877), 123 Mass. 28;
> *National Bank v. Hall* (1824), 101 U. S. 43;
> *Boyd v. Calkins* (1928, Kans.), 268 Pac. 749;
> *Strauss & Co. Inc. v. Berman* (1929, Penn.), 147 Atl. 85.

Consequently there is no foundation for appellee's theory that appellant was contractually obligated to the other bank creditors; nor is there any support for the further contention that the continuation by appellee of his duties as receiver was a sufficient consideration to support the alleged promise of waiver on the part of appellant. At the most, such continuation in office was simply the motive or inducement

which prompted appellant to promise waiver of its lien, again assuming that there was such a promise. In other words, there is nothing in this case which shows that appellant was bargaining for the continuation by appellee of his duties as receiver.

In *Williams v. Hasshagan* (1913), 166 Cal. 386, 137 Pac. 9, the following pertinent language appears, at page 390:

> "Mere motive or inducement or hope of profit is not consideration. 'If a motive alone were equivalent to a consideration, every promise made free from fraud, duress and the like, would necessarily be enforceable without any consideration.' (Page on Contracts, sec. 275. See, also 9 Cyc. 320.)"

(3) Appellant is not Entitled to Rely Upon the Doctrine of Estoppel.

Because of the absence of consideration for the alleged waiver of its banker's lien on the part of appellant, appellee must necessarily fall back on the doctrine of estoppel. But before appellee may properly take advantage of an estoppel he must show that he himself relied upon the alleged misrepresentations to his detriment. There is no evidence in this case of any such reliance, but instead appellee seeks to establish that others, not parties to this proceeding, are the ones who relied thereon to their detriment, to-wit, the other bank creditors of Richfield Oil Company. This in turn is based upon the transfer to the Receiver of their Richfield balances by these banks, supposedly in reliance upon the relinquishment by appellant of its balances and draft proceeds. If these banks have any rights at all in the premises, appellant again submits

that such rights were satisfied by the relinquishment of Richfield's cash balance with appellant in January, 1931. There is no evidence in the record of this case that the other bank creditors had any knowledge of the draft collections with appellant. If any bargain at all for relinquishment was made between appellant and the other banks it did not extend beyond the cash balances.

A. The Other Bank Creditors are not Parties.

However, appellee has no standing to assert in this proceeding the estoppel rights of such bank creditors for they are not parties to this action.

In *Williams v. Purcell* (1914, Okla.), 145 Pac. 1151, the defendant attempted to invoke an estoppel against the plaintiff on the ground that one not a party to the action had relied to his detriment upon a letter written by plaintiff to defendant. At page 1156, the Court disposed of this mistaken contention in the following language, quoted from 16 *Cyc.* 777:

> " 'Estoppels operate only between parties and privies, and the party who pleads an estoppel must be one who has in good faith been misled to his injury.' "

In *Farmers' State Bank of Gladstone v. Anton* (1924, N. D.), 199 N. W. 582, it was said in the headnote:

> "Where the representations which it is contended give rise to an estoppel were not made to or intended for the benefit of the party who seeks to predicate an estoppel thereon, or where the representations are not general or intended to

> influence third persons, the public at large or persons occupying a relation to the subject matter of the representations similar to that of him to whom they were made, no estoppel arises of which a third person can take advantage."

To the same effect are the cases of:

Christian v. Fancher (1921, Ark.), 235 S. W. 397;

Brickley v. Edwards (1892, Ind.), 30 N. E. 708;

Verrell v. First Natl. Bank of Roseberg (1916, Ore.), 157 Pac. 813.

In *Mercantile Trust Co. v. Sunset etc. Co.* (1917), 176 Cal. 461, 168 Pac. 1037, the Court said, at page 472:

> "It is of the essence of an estoppel in pais that the party asserting such estoppel should not only have been ignorant of the true state of facts but that he should have relied upon the representation or admission of the adverse party."

B. The Receiver Does not Represent the Other Bank Creditors. He Cannot Assert Their Rights Against Appellant.

Appellee attempted to circumvent the rule announced in the foregoing authorities by the argument that appellee as receiver represented all the creditors and therefore was entitled to assert their rights in this proceeding. This is another proposition which has no merit in law. Appellee may cite cases holding that the receiver represents the interests of the creditors to the extent that he is entitled to go out and gather in all the assets of the receivership estate for their benefit. But there are no cases which hold that the receiver is entitled to assert these rights which are private and

peculiar to any one creditor or group of creditors. In fact, the cases are to the contrary.

In *United States Mortgage & Trust Co. v. Missouri K. & T. Ry. Co.* (1921), 269 Fed. 497, plaintiff, as trustee under a trust deed executed by a railroad corporation, brought suit against various corporations which were part of the complicated financial structure of the railway. All of these corporations were in receivership, but the assets held by the receivers of only two of the corporations were directly involved. On the application for leave to sue the other corporations and the receivers thereof the trial Court first denied leave to sue the receivers, and then, on the ground that said receivers were indispensable parties, refused to allow a joinder of the corporations whose assets said receiver held. The Circuit Court of Appeals in reversing this Order as to the corporations themselves, said at page 501:

> "The receiver of the Oklahoma and Kansas corporations has no title or right of property of any of the parties vested in him. He is an indifferent person appointed as custodian to hold the property of said corporations subject to the further order of the Court. Where an attempt is made to take property out of his possession, then he is a proper party to litigation, and where relief is sought against his acts as such receiver, he is the proper party litigant; but where the litigation affects the rights of parties in property not in his hands or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party to such litigation * * * *A receiver does not represent the justiciable rights*

of the parties to the litigation of which he is receiver, but only the protection of the property in his hands as such or the collection of that to the possession of which as receiver he is entitled." (Italics ours.)

In 53 *Corpus Juris,* p. 135, the rule is stated as follows:

"While for some purposes a receiver is treated as a representative of the person whose property he is appointed to administer or of other interested parties, strictly speaking he is not, in the execution of his trust and the management and disposition of the property committed to his possession, the representative or agent of any such person or party * * * A receiver is, rather, for the time being, a ministerial officer, and representative of the Court having charge of the receivership * * *"

To the same effect see:

Bingamon v. Commonwealth Trust Co. (1924), 1 Fed. (2) 505;

Matarrazzo v. Hustis (1919), 256 Fed. 882;

Goodman Mfg. Co. v. Pittsburgh-Buffalo Co. (1915), 222 Fed. 144;

Kansas City Terminal Ry. Co. v. Central Union Trust Co. (1923), 294 Fed. 32.

The case of *Equitable Trust Co. v. Great Shoshone etc. Water Power Co.* (1917), 245 Fed. (9th Circuit) 697, is illustrative of appellant's contention on this phase of the case. There a mortgage of property belonging to a corporation in receivership brought an action to foreclose, joining the receiver. Several judgment creditors of the corporation, claiming liens,

were allowed to intervene. This Court held that such intervention was proper. The implication in the decision and opinion is strong that the receiver was not a representative of the creditors as to their private rights; if he had been intervention would not have been necessary.

It is true that there is a line of authority composed of a few cases in which the receiver has been loosely said to represent the creditors. Among such decisions are:

Hamor v. Taylor-Rice Engineering Co. (1897), 84 Fed. 392; and

King v. Pomeroy (1903), 121 Fed. 287.

In the latter case the receiver sued stockholders of the corporation in receivership on their stockholders' liability. The Court stated that the receiver was the representative of the creditors and held that these liabilities were assets of the estate just as much as they were assets of the creditors, and being assets of the estate, the receiver therefore had a right to collect the same for the benefit of all creditors; it was in this connection only that the receiver was referred to as representing the creditors. A different result follows when the question is as to whether the receiver may enforce rights of the creditors growing entirely out of transactions between them, or some of them, and third persons.

The Court, in *La Follett v. Akin* (1871), 36 Ind. 1, 6, clearly shows the manner in which this loose reference to the representative character of the receiver is often used. Quoting from the case of *McHarg v. Donnelly*, 27 Barb. (N. Y.) 100, the Court said:

"It is sometimes said, a little loosely, that a receiver represents all the parties. This is well explained in the case of *McHarg v. Donnelly,* 27 Barb. 100, where Hogeboom, J. in delivering the opinion of the Court, said: 'I am aware that it has been held that for certain purposes—for example, setting aside a fraudulent assignment—the receiver represents the creditors of the judgment debtor. But he is so characterized simply in contradistinction to his being representative of the judgment debtor. He is said to represent the creditors, because he represents the estate of the judgment debtor, in which the creditors are interested as well as the debtor himself.' "

C. The Receiver Cannot Enforce Personal Rights of Creditors Arising Subsequent to His Appointment.

In the case at bar, appellee seeks to enforce the personal rights of creditors of Richfield Oil Company supposed to have arisen through the breach of an alleged contract made and entered into subsequent to the appointment of the receiver, or through a purported estoppel as of that time. The authorities are numerous that the representative character of a receiver applies only to such rights as exist at the time of his appointment. The following quotation from *Equitable Trust Co. v. Great Shoshone etc. Water Power Co.* (supra), at page 703, is sufficient to show this:

"We quite agree with the learned counsel for the appellants that, in the absence of specific state statute or decisions of the state courts conferring special rights and powers, and where he is not appointed for the purpose of impounding it for a specific purpose, the appointment of a receiver of property by a federal court is for the protec-

tion and preservation of all rights and interests therein *existing at the time of such appointment.*" (Italics ours.)

The rights here involved have nothing to do with the conservation of the assets of the estate. They are rights personal to a class of creditors, the bank creditors, separate and distinct from the receivership proceedings. Therefore, the cases herein cited to the effect that the receiver is not a representative of the creditors are controlling. And since these creditors are not parties to this action, appellee is not entitled to enforce any rights which they may have by virtue of a supposed estoppel in their favor against appellant.

(4) The Trial Court Erred in Admitting Testimony Regarding the Meetings of the Richfield Bank Creditors and the Communications Between These Creditors and the Receiver.

Mr. McDuffie and Mr. Nolan were allowed to testify, over the objection of appellant, as to what was said at two meetings of the bank creditors of Richfield Oil Company. (R. 205, 206, 207, 208, 240, 241, 242.) No representative of appellant bank was present at either of these meetings. The purpose of the testimony was obviously to show that an agreement was entered into between the bankers present that they would waive the liens of their banks upon the accounts of Richfield. Since appellant was not represented at these meetings, there can be no question but that the evidence as to what occurred was hearsay, incompetent, irrelevant and immaterial and not binding upon appellant. (Assignment of Errors VIII (a), R. 481, 482.) Nor was the objection to this testimony cured by the evidence of Mr. Nolan that he communicated the *substance* of

what occurred at the meeting by telephone to Mr. Eisenbach of appellant bank. (R. 242, 243.) This was an unsolicited communication to appellant and there is no evidence whatsoever that appellant acquiesced in that which Mr. Nolan communicated to it. In fact, the evidence is that Mr. Eisenbach said nothing as to what appellant's course of action would be. (R. 243.) Nor can any such acquiescence be obtained from the telegram of January 16, 1931, to the receiver. This telegram was only a communication between the receiver and appellant bank, in response to one sent by the receiver to appellant. It cannot possibly be construed as an agreement with the various bankers. Appellant submits that if there was any agreement, it was solely between appellant and the receiver. Consequently, and for the other foregoing reasons, the evidence as to what was said at the meetings between the bankers was inadmissible.

The same reasoning applies to the admissibility of the telegraphic and letter communications between the other bankers and appellee. (R. 211, 217.) Objection was made by appellant to their introduction in evidence. It is now submitted that the Court below erred in overruling all such objections. (Assignment of Errors VIII (b), R. 482.)

CONCLUDING SUMMARY.

(a) Of the Facts.

The drafts, the proceeds of which are the subject of this litigation, were either deposited under the acceptance agreement or they were not. If under the agree-

ment, its language to the effect that they are security not alone for the acceptances issued thereunder, but likewise for "any other liabilities from us (Richfield) to you (bank), whether then existing or thereafter contracted", is controlling. The evidence is overwhelming that the drafts were deposited under the agreement. Mr. Hall's negotiations were for a line of credit upon an acceptance basis, and Mr. Lipman told him that this line would be advanced upon the security of foreign drafts to be deposited by Richfield. The terms of the acceptance credit were reduced to writing in the acceptance agreement, executed by Richfield on October 4, 1930, and delivered to appellant October 6, 1930. Each and every transaction with respect to the deposit of drafts with appellant followed the establishment of this line of credit and the execution of the agreement. The first items involved were the four Birla Bros. drafts and the first letter subsequent to the execution of the agreement was the Lyons letter (R. 316) emanating from Richfield and directing the issuance of acceptances for $115,000.00 *against* the Birla Bros. shipment. Contemporaneously, the letter of transmittal and the four Birla Bros. drafts were delivered to appellant. Thereafter the other drafts were deposited and the procedure with respect to each and every one of them was alike,—in the forwarding by Richfield, the letters of transmittal, the receipt of the drafts and the handling thereof by appellant. Nothing intervened to change or alter the instructions or the character of the obligations under the agreement. To meet this situation, appellee was compelled to resort to a fiction that his evidence does not sustain, viz., that a specified few of the drafts were to be

deposited as security for specific acceptances and that the remaining drafts were forwarded solely for collection. This is unwarranted and, at best, rests upon a misconception as to the manner in which the bank was to issue its acceptance, that is, based principally upon or measured by certain satisfactory drafts forwarded to and deposited with the bank, all of which, however, were security for the advances. The most casual comparison of the records of Richfield which were composed only of the uncommunicated "little pencil memorandums", with the records of appellant, consisting of the carbon copies of the letters of transmittal, marked "Security for acceptances, proceeds to Clemo" (R. 377 et seq.) and the ledger page (R. 394 et seq.) substantiates appellant's position that the transaction was a single one and that all drafts were deposited as security for acceptances.

Important likewise is the fact that a continuous or a revolving credit was intended. Mr. Hall, himself, characterized it as a "credit line." Mr. Hellman and Mr. Lipman referred to it as a "loan line" or a "credit line." All the advances were not made under it at one time, but only as the acceptances were issued. It was a credit admittedly, not a mere loan, and under the operation of the credit, as acceptances were paid further advances within the loan limit could be made. Appellant's records again substantiate this, as does the testimony with respect to the establishment of the credit and the agreement that the same was cancellable. The fact that in the few days prior to the receivership, when for the first time acceptances had been paid and additional credit made available, Rich-

field did not use the credit, is no argument that the credit did not exist, since during a period of over a month in October and November, 1930, when admittedly the sum of $20,000.00 under the credit had not been used by Richfield, no request for acceptances was made.

But if despite all this, it is believed that the drafts here in question were not deposited under the acceptance agreement, none the less, they are all subject to appellant's banker's lien or right of setoff. On appellee's own theory they certainly were not deposited as security for any specific indebtedness and consequently were not subject to the rule of *Berry v. Bank of Bakersfield* (supra). Appellee claims an agreement waiving this lien based entirely upon the alleged statements of Hall that the "transaction is to be kept separate and apart." Accepting this at its face value, it does not constitute a waiver of lien, particularly in view of the knowledge of all the parties, including Mr. Hall, of the existence of the lien right at the time the so-called agreement was made. In asking that the transaction be kept separate, if indeed he did so ask, Mr. Hall desired only that it not interfere with the loan line of Richfield (otherwise the treasury officials of the company would not approve it); he undoubtedly likewise desired that, for accounting purposes, the proceeds should go through his department so that he could more readily ascertain what his commissions would be. But here again the probabilities are all against the agreement for which Hall contends. The parties did not discuss and were not bothered about any banker's lien. Rich-

field had in the previous July borrowed an additional $125,000.00 and its credit was still deemed good. The parties were simply concerned with the line of credit, and the new one about to be established.

Apparently realizing the logic of appellant's position that either the drafts were under the acceptance agreement and subject to its terms, or not under the acceptance agreement but subject to banker's lien and right of setoff, appellee has resorted to an alleged waiver of all liens by an exchange of telegrams between appellee and appellant. Appellant stands flatly and positively upon the language of the telegraphic exchanges. It believes that the framers of the telegrams meant what they said—that the request was to transfer the cash balances, and that this request was complied with. Appellant believes that nothing transpired at the meeting with the bankers, assuming the competency of the evidence thereof, which in any way militates against this fact. Appellant believes that the telegrams should be taken by their four corners and the intention of the parties determined therefrom. The unnatural, strained and artificial interpretation sought by appellee to be placed upon his telegram and appellant's answer defeats itself by its very unnaturalness and its illogical artificiality.

(b) Of the Law.

Each of the propositions of fact urged by appellant finds full support in the authorities. The burden of proof with respect to the agreement is not, as appellee contends, upon appellant, but upon appellee. The answer is an affirmative traverse, and the burden has

not shifted. There is no doubt anywhere in the authorities but that if the acceptance agreement controls, so does its provision that the security for the acceptances is security likewise for the general indebtedness of Richfield to appellant. Under the parol evidence rule, no oral understanding to keep any of the drafts separate and apart is admissible to contradict the provisions of the agreement.

And if the drafts in litigation were not under the acceptance contract the authorities unanimously hold that any agreement to waive a banker's lien must be positive and definite, if it is to be effective. Appellant respectfully submits that the cases of special deposit or deposits in trust cited by the trial Court have no bearing here. If it was a trust, what was it for? If it was a specific deposit, what was it for? The mere deposit for collection does not create a special deposit or a trust. Numerous cases have hereinbefore been cited to the effect that drafts and other documents deposited for collection are subject to banker's lien and setoff. Furthermore, if there is any uncertainty in the language used by Mr. Hall, it is the uncertainty of Mr. Hall and Richfield, and upon them must fall the burden of the loss.

The facts in the fairly recent case of *Updike v. Oakland Motor Car Co.* (supra) are far stronger in support of a waiver of right of offset than in the case at bar, but notwithstanding, the Court held against the waiver of setoff because it was not *definitely* expressed, stating:

> "An agreement must be clear and specific to deprive a party of the ordinary right of setoff."

The case of *American Surety Company v. Bank of Italy* (supra) is also controlling in its holding that before the ordinary relations of a bank and its depositor will be deemed changed, the agreement to that effect must be specific and unambiguous.

Similarly, too, the argument that subsequent to the appointment of the receiver there was a waiver of appellant's rights, falls not alone upon the facts but upon the law itself. The presumption is as strong against a subsequent waiver as against a prior waiver of lien. Language must of course be given its normal interpretation, and so say the cases. The relinquishment of part of the proceeds has no legal effect whatsoever, nor has the filing of the claims as unsecured in the receivership proceedings. Furthermore, a waiver must amount to a contract supported by consideration, and none has here been shown. Nor is appellant estopped as against the receiver in this action, assuming that the telegrams have the full effect which counsel seek to give them. The receiver does not represent Richfield's creditors with respect to their alleged rights originating *subsequent* to the receivership, or as to their rights as against each other.

From the time of the appointment of the receiver, the appellant bank sought to act in such a way as to be fair, both to the receiver and to its own depositors and stockholders. Thus it cooperated with the receiver to the extent of returning to him over $40,000.00 in bank balances and approximately $35,000.00 of draft proceeds. If it be the law that appellant must suffer because it cooperated to the extent of

more than $75,000.00, then the law attaches a heavy penalty to cooperation. It is submitted that such is not the law.

Whether the drafts be considered as deposited under the agreement and subject to its express terms, or whether they be considered as deposited for collection only and subject to appellant's right of banker's lien and setoff, the answer is the same,—appellant may retain the proceeds of the drafts which are the subject of this litigation and apply them against the past due general indebtedness of Richfield Oil Company of California to it. This answer compels the reversal of the judgment of the trial Court.

Dated, San Francisco,
March 5, 1934.

Respectfully submitted,
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No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO. (a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

BRIEF FOR APPELLEE.

This action was *originally* instituted by plaintiff (now appellee) for the purpose of preventing the appellant bank from exercising its alleged banker's lien and right of off-set upon certain foreign drafts claimed by appellee to have been previously deposited with appellant solely for collection, and to enjoin appellant from exercising its alleged right of off-set when the proceeds of said drafts came into its possession.

Subsequent to the commencement of the action, appellant collected $144,758.79 representing the net

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(NOTE): To subserve the convenience of the court we have attached hereto in an appendix Plaintiff's Exhibit 117 consisting of Schedules A to L inclusive. These schedules will assist the court in its consideration of the evidence. They were explained in detail by the witness Pope. (R. 326-35.)

proceeds of all of said drafts, which sum it appropriated to its own use under its alleged right of off-set, in partial payment of certain indebtedness then due to it from Richfield Oil Company.

THE PENDING CONTROVERSY, WHEN DETERMINED, WAS AN ACTION AT LAW AND NOT A SUIT IN EQUITY.

At the time this action was instituted, only the smallest of the drafts herein involved had been collected in full and a portion only of another small draft not involved in this appeal. The remaining drafts were in process of collection. In order to obtain appropriate relief under the circumstances then existing, it was essential that the controversy should take the form of a suit in equity. Prior to its trial, however, all of the drafts in controversy had been collected by appellant. At the conclusion of the trial, appellee moved the court for a judgment in its favor for the sum of $144,758.79, being the proceeds of said drafts, together with legal interest thereon. (R. 466.) It was then stipulated by the parties

> "that the amended bill of complaint be considered amended so as to pray for a money judgment." (R. 466.)

The decree entered by the lower court directed appellant to pay to appellee $163,303.85, being the principal of the proceeds of the drafts to which appellee claimed it was entitled with legal interest added thereon, together with its costs. (R. 198-9.)

It must be apparent to the court that, regardless of its nature when commenced, before trial the action assumed the attributes and characteristics of an action at law. At the time of trial, appellee neither sought nor was entitled to equitable relief. His remedy at law was adequate, and the only relief to which he was entitled was a money judgment.

That counsel for appellant were then of the opinion that the action was one at law is shown by the fact that at the commencement of the trial,

> "counsel for both parties stipulated that trial by jury be waived." (R. 200.)

Under these circumstances, upon this appeal the action must be deemed to be an action at law and controlled by the rule stated by Judge Sawtelle in *Clements v. Coppin,* 61 Fed. (2d) 552, as follows:

> "It is well settled that the finding of the trial judge based on conflicting testimony taken in open court will not be disturbed on appeal." (Citing cases including *U. S. v. United Shoe Mach. Co.,* 247 U. S. 32; 62 L. Ed. 968.)

In *Babbitt Bros. Trading Co. v. New Home Sewing Mach. Co.,* 62 Fed. (2d) 530, (C. C. A. 9) the court at page 533, said:

> "There is a sharp conflict in the evidence and of course it is not incumbent upon this court to reconcile such conflict or to weigh the evidence; our sole duty is to determine whether there is any substantial evidence tending to support the findings of the court below. We are prepared to say, however, that the findings of the court are fully sustained by the evidence."

See also:

Independence Indemnity Co. v. Sanderson, 57 Fed. (2d) 125, (C. C. A. 9.)

Even though this court should consider this action as one in equity rather than one at law, nevertheless inasmuch as all of the witnesses testified in open court before the trial judge, the findings of the lower court are presumptively correct and will not be disturbed unless clearly wrong.

In *McCullough v. Penn Mutual Life Ins. Co.,* 62 F. (2d) 831, which was a suit in equity, this court, speaking through Judge Wilbur, said:

> "The trial court after hearing the witnesses who testified in open court, and upon due consideration of several written statements made by appellant in connection with * * * found the fact to be * * *. These findings are supported by the admission of appellant and by other substantial evidence adduced by witnesses appearing before the court, and under well settled rules these findings cannot be disturbed."

In *Collins v. Finley,* 65 Fed. (2d) 625, this court, through Judge Sawtelle, said:

> "As was said by Judge Rudkin in the case of Easton v. Brant, 19 F. (2d) 857, 859, 'The appellant is confronted by two well established principles of law from which there is little or no dissent; first, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal save for obvious error of law or serious mistake of fact. * * *' (Citing cases.) * * *

> This consideration alone requires an affirmance of the trial court's findings on the facts."

In the case of *U. S. v. McGowan,* 62 F. (2d) 955, this court, through Judge Wilbur, stated:

> "It is true that in an equity case the evidence is reviewed by this court, but it is a fundamental rule that where the witnesses testify in person before the trial judge he is in a better position to pass upon the credibility of a witness than this court, and we will follow the decision of the trial judge unless it is clearly apparent that his decision is erroneous." (Citing cases.)

In *Butte & Superior Co. v. Clark-Montana Co.,* 249 U. S. 12; 63 L. Ed. 447, Mr. Justice McKenna states the rule as follows:

> "The Circuit Court of Appeals affirmed the findings, saying, by Circuit Judge Gilbert: 'The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal.' And we said in *Lawson v. United States Mining Co.,* supra, of the conclusion of the Circuit Court of Appeals in such case—and the concession is as great as appellant is entitled to—'That if the

testimony does not show that it (the conclusion of the court) is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong.' The findings accepted, the conclusion of law must be pronounced to be of necessary sequence."

See also:

Suburban Improvement Co. v. Scott Lumber Co., 67 F. (2d) 335;

Benedict Coal Corp. v. Fidelity etc. Ins. Co., 64 F. (2d) 347;

Exchange Nat. Bank etc. v. Meikle, 61 F. (2d) 176;

New York Insurance Co. v. Simons, 60 F. (2d) 30;

Karn v. Andresen, 60 F. (2d) 427;

Mayfield v. Pan American Life Ins. Co., 49 F. (2d) 906;

Kennedy v. White Bear Lake, 39 F. (2d) 608;

Shell Eastern Petroleum Products v. White, 68 F. (2d) 379.

FOREWORD.

In its findings of fact, after a full consideration of all the evidence introduced by the parties hereto, the court, among other things, found:

1. That all of the drafts deposited by Richfield Company with appellant were deposited for collec-

tion. (R. 184.) The integrity of this finding is conceded by appellant.

2. That only the so-called short-term drafts of an aggregate amount slightly in excess of the amount of the acceptances issued by appellant bank and having a maturity earlier than the maturity of said acceptances, the proceeds of which could be and actually were received by appellant bank at least one day before the maturity date of the acceptances secured thereby, were deposited as security under the acceptance agreements. (R. 189-90.)

3. That all foreign drafts were deposited upon the agreement that they and their proceeds should be entirely separate and apart from all other financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between said parties. (R. 190.)

4. That none of the drafts or their proceeds which are the subject of this appeal was deposited by the Richfield Company with appellant bank as security under said acceptance agreements (R. 193), but all of said drafts were deposited under and in reliance upon said agreement that they and their proceeds should be entirely separate and apart from all other financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between said parties. (R. 184-5.)

5. That at or about the time of the appointment of the receiver it was agreed between said receiver and the creditor banks, including appellant, that each of said banks would forthwith transfer the deposit

account so held by it in the name of Richfield Company to that of said receiver, and would carry on and conduct said account in the ordinary course of business and would not exercise any claim of banker's lien upon said account, including collections, except such collections as were security for the acceptances theretofore issued by appellant, and that such agreement was made in order to enable said receiver to carry on and transact the affairs of said Richfield Oil Company for the benefit of the creditors until the termination of said receivership. (R. 190, 191.)

If this court concludes, as we submit it must, that there is evidence in the record sufficient to sustain the finding of the lower court that the drafts here involved were not deposited as security under the acceptance agreements, then it only becomes necessary for the appellee to establish to the satisfaction of this court that there is sufficient evidence in the record to sustain **either** the agreement mentioned in subdivision 3 hereof **or** the agreement referred to in subdivision 5 hereof, each of which was found by the court to have been made. Furthermore, if this court concludes that there is sufficient evidence to establish *either one of these two agreements it will be unnecessary for it to pass upon the sufficiency of the evidence to sustain the other agreement.*

STATEMENT OF FACTS.

While, as we have already pointed out, unless the findings of the lower court are entirely lacking in sub-

stantial evidentiary support, the judgment entered herein must be affirmed,—in view of the attack made by appellant upon the lower court's decision, and having in mind the claim asserted by appellant (which, however, we dispute), that this is a suit in equity and therefore this court is not bound by the findings of the lower court, but on the contrary is entitled to weigh the evidence and in effect try the case *de novo*,—we believe it necessary to descend into greater detail in the narration of the facts than would otherwise be required.

UNCONTROVERTED FACTS.

For a number of years prior to October 1, 1930, the Richfield Oil Company was engaged in the business, among others, of producing, refining, selling and distributing oil and its various by-products, its principal place of business being in Los Angeles, California. For some years prior to October, 1930, it maintained an export and foreign department through which it negotiated for the sale of and sold to foreign customers its commodities and products. Subject to the instructions and directions of the executive officers of the Richfield Company, this export and foreign department was in charge and under the control of Robert L. Hall. (R. 337-8.)

In the conduct of its business, the Richfield Company maintained commercial accounts with a number of substantial banking institutions located principally in California, but some of which were scattered throughout the north and east. For at least a number

of months prior to October, 1930, the Richfield Oil Company was indebted in a sum in excess of $10,000,000 to twelve of these banking institutions, no part of which was secured: $625,000 of this unsecured indebtedness, represented by a promissory note maturing October 10, 1930, was owing to appellant bank. (R. 218.)

A substantial portion of the foreign business engaged in by the Richfield Company was done on credit. Aside from the occasional use of letters of credit, drafts would be drawn by the company upon its foreign customers the terms of which would accord with the agreement upon which its commodities were sold to them. Where the sale was practically a cash transaction, a sight draft would be drawn. If the sale was made upon credit alone, a draft would be drawn for acceptance, payable at the end of the credit period. Where the terms of sale involved part cash and part credit, a sight draft would be drawn, representing the cash payment and a term draft for the credit period. After the goods were shipped, the draft or drafts, accompanied by the shipping documents, would be deposited with the bank for collection through its foreign correspondent. In the instances where both a sight draft and a term draft were drawn, the documents were ordinarily deliverable upon payment of the sight draft and upon acceptance of the term draft.

One of the principal foreign customers of the Richfield Company was Birla Bros., located at Calcutta, India. The agreement upon which the Richfield commodities were sold to this customer was one-half cash

represented by a sight draft and the remaining one-half payable in 180 days, represented by a draft payable 180 days after its acceptance. The documents representing each shipment to Birla Bros. were deliverable to it upon payment of the sight draft and the acceptance of the 180-day draft. (R. 338.)

On account of its financial necessities, for some considerable period prior to October, 1930, the Richfield Company had discounted most of its foreign drafts with the Security-First National Bank of Los Angeles. About this time the Richfield Company became dissatisfied with the manner in which its foreign collections were being handled and concluded to transfer this portion of its business to appellant bank. (R. 339-40.)

With this purpose in mind, during August, 1930, Robert L. Hall, manager of the export and foreign department of the Richfield Company, after conferring with one or more of his superiors, came to San Francisco and engaged in a conference with W. G. Gilstrap, assistant manager of the Foreign Department of appellant, informing him that if agreeable to the bank, the Richfield Company would be glad to turn over to it practically all of its foreign collections. During the course of the discussion, the use of bank acceptances was discussed. The saving to the Richfield Company as the result of the use of such acceptances was mentioned, and the procedure surrounding the execution and release of acceptances by the bank was described and given consideration. It was finally understood that Hall should return to Los Angeles, and if the use of acceptances was agree-

able to the executive officers of the company, such plan would be thereafter pursued. Thereafter and on October 1, 1930, Hall telephoned to Gilstrap, requesting him to send to the company by mail, forms of acceptance agreements and acceptances, which was done. (R. 340 et seq.)

Employed in the Foreign Department of the Richfield Company was one Homer E. Pope, whose duties consisted in giving attention to the foreign collections. All shipping documents, letters of transmittal and drafts were submitted to him for examination and passed through his hands. A complete and detailed record of all collections and their approximate due dates was constantly kept by him. (R. 249.)

On the morning of October 6, 1930, Mr. Hall and Mr. Pope called at appellant bank, the latter having in his possession an executed form of acceptance agreement, as well as proposed acceptances, fourteen in number, signed by the Richfield Company aggregating $150,000, being the total amount of acceptances specified in the acceptance agreement. This trip was taken after Mr. Hall had discussed with some of the executive officers of the company the propriety of utilizing acceptances and had reported to them the substance of the conversation occurring between himself, Gilstrap and other officials of the bank upon his August visit. (R. 345.) Mr. Pope was brought to San Francisco in order to thoroughly familiarize himself with the mechanics surrounding the execution and release of acceptances and the details of the arrangement between the Richfield Company and the bank. This information was essential to enable him to prop-

erly and correctly keep his records respecting foreign drafts and collections. The acceptance agreement, together with the acceptance forms, all executed by the Richfield Company, were delivered by Pope to Gilstrap. (R. 260-1.)

With respect to the matters above narrated, the evidence is without dispute. These facts are mentioned merely by way of introduction to the matters in controversy, to which under appropriate titles and as sequentially as possible reference will now be briefly made.

CONTROVERTED FACTS.

It was agreed that the foreign collections should be deemed to be separate and apart from other business of Richfield with, and its financial obligation to appellant bank.

It is claimed by appellee that it was agreed by appellant that ALL of the foreign drafts deposited with it by Richfield for collection should be considered and deemed to be and treated as entirely separate and apart from all other transactions occurring between Richfield and appellant, including Richfield's indebtedness to the bank. That the integrity of this agreement has been demonstrated by the evidence cannot be seriously disputed.

It has frequently been held that in reaching a determination with respect to matters in controversy, the court is justified in giving consideration to whether the position assumed by a litigant is in ac-

cord with the probable conduct of a reasonable person similarly situated. That the agreement here asserted would have been insisted upon by any reasonable business man under like circumstances must be obvious.

At the time of the inception of the transactions here being considered, the Richfield Company owed appellant an unsecured indebtedness of $625,000, evidenced by a promissory note which was to mature on October 10, 1930. In the absence of any agreement to the contrary, or circumstances inconsistent with its exercise, the moment such unsecured indebtedness matured, the bank would have been legally authorized to exercise its banker's lien upon every draft deposited with it for collection, and, upon the collection of such drafts, would have been legally entitled to appropriate the proceeds thereof to offset such unsecured indebtedness. Under like conditions, upon the sale or discount of any acceptance executed and released by it, provided the proceeds came into the bank's possession, it would have had a right to apply such proceeds in payment, either in whole or in part, of such indebtedness.

The right of a bank to exercise its banker's lien as well as its right of set-off was known to Hall, as it was known to the other executives of Richfield. (R. 341.) At this time the Richfield Company was and thereafter continued to be in dire need of funds. (R. 341.) Its profit upon its foreign business, which has been entirely built up by Hall, was almost negligible in character. The cost of producing and making ready its commodities for foreign shipment was

required to be advanced by it. The freight charges upon these transactions had to be paid in advance of shipment. Faced with these conditions, it could ill afford to take the chance of depositing with a bank foreign collections involving large sums, unless it was understood that neither the drafts themselves nor their proceeds, when collected, could be utilized by the bank in extinguishment, either in whole or in part, of an unsecured indebtedness far in excess of the collections entrusted to it. The executive officials of Richfield, as well as Hall, knew that many banks substantial in character existed in California, to which no indebtedness was owed by Richfield, and to which its collections could readily have been entrusted without being menaced by the possible exercise of a banker's lien or right of offset. That the Richfield Company would deposit its foreign drafts for collection with appellant and permit it to receive the proceeds of the acceptances issued and released by it, in the absence of a special agreement preventing the exercise of its banker's lien or right of set-off, is inconceivable.

In giving consideration to the evidence bearing upon this subject, the court must conclude that the probabilities are that the agreement contended for by appellee was made. The evidence upon this subject, however, while to some extent in conflict, is convincing that the agreement testified to by Hall and Pope was actually entered into.

It will be recalled by the court that although Hall was manager of the Foreign Department of Richfield and responsible for its proper functioning, before

coming to San Francisco he had a conference with its officials, during the course of which the purpose intended to be achieved by him was given consideration and discussed. In fact, in making the arrangements with the bank, he was following the orders given him by these officials. (R. 346.) Furthermore, he was interested in the financial success of his particular department, because upon such success depended the amount of the compensation to which he was entitled. Indeed, as has already been intimated, within a period of four years, Hall built up the foreign trade business of Richfield in various foreign ports. (R. 337.) It would indeed be remarkable if, under the proven circumstances Hall would have failed to insist upon the agreement testified to by him. That the agreement was made is clearly shown by his evidence. In August, 1930, during the first conference occurring between him and Gilstrap, Hall testified:

> "I discussed with him the general situation of the Richfield Oil Company's collections and stated that I was contemplating turning over all of the Richfield's collections in foreign countries as far as possible to them. I explained to him that I would be responsible as far as possible for those collections and watch them. * * * I asked him to remember that any transactions were to be considered separate from other transactions of the Richfield Company — the entire transactions, monetary, the collection of drafts for us or any other business connected with the Foreign Department of Richfield Company." (R. 340.)
>
> "I stated to him that I had an interest in all collections which were emanating from the For-

> eign Department and that I wanted him to consider that it was a separate business arrangement from any other business which Richfield had with Wells Fargo Bank. Mr. Gilstrap said that he understood my position." (R. 341.)

After his preliminary conference with Gilstrap, Hall was taken by Mr. Hellman to Mr. Lipman, president of the bank. To this conversation Hall testified:

> "He (Lipman) said that he would give a further line of credit based on foreign drafts in the amount of $150,000 or thereabouts and see how it would work out. I then made it particularly strong to Mr. Lipman as to my position as manager of the Foreign Department; that I would continue to give my very careful attention to the drafts of the Foreign Department for two reasons; that I had a personal interest in the collections of the Department, *and that I wanted it considered to be a separate transaction from any obligations or any transactions other than those of the Foreign Department—Richfield obligations I mean.* Lipman then said, 'That is good' or 'That is excellent.'" (R. 343.)

This conversation was later reported by Hall to Mr. Gilstrap. (R. 343.) Upon cross-examination he reiterated that he had stated to Mr. Lipman

> "that it was to be understood that this further credit was to be kept separate and be a distinct arrangement with the Foreign Department." (R. 358.)

Upon the visit of Hall and Pope to the bank on the morning of October 6, 1930, this arrangement was

again made the subject of discussion. According to Hall, after Gilstrap, at the request of Pope, had telephoned to Mr. McKee, Hall

> "reiterated my former conversation with Mr. Gilstrap that if the acceptances were used it must be definitely understood that it was a separate transaction from any other transaction in a monetary way which Richfield had with Wells Fargo Bank. I was following orders in that respect from Mr. McKee." (R. 346.)

This testimony is corroborated by Pope who testified:

> "During the course of the conversation Mr. Hall said that he wanted the transaction with the Foreign Department considered a thing apart from the regular transactions of Richfield with the bank." (R. 264.)

Upon cross-examination it was attempted to be shown that the first time Pope ever heard from Hall that he had an interest in the Foreign Department was when he was having a dispute with the receiver respecting the payment of his share of the profit of the export department. This was denied by Pope, who testified:

> "I know that once he made that statement before the receivership. That was during our talk with Mr. Gilstrap. As I remember it, the substance of his statement was that he wanted the Foreign Department business of Richfield kept as a separate and distinct transaction from other business that Richfield might do with the Wells Fargo Bank." (R. 325-6.)

While this testimony given by Hall and Pope was denied by Gilstrap and Hellman, it is apparent that in this respect the memories of the latter are clearly at fault. It appears without dispute that the subject matter of this agreement was discussed by Hall with both of these officials during his conferences with them and other officials at the bank in May, 1931, after he had been informed that the bank had exercised its so-called banker's lien upon the drafts herein involved and intended to retain their proceeds. Immediately thereafter, Hall came to San Francisco to protest against such action and endeavored to have the drafts as well as their proceeds forthwith released. During the discussions which followed, one of the reasons given by Hall why the action taken by the bank was without justification was that it had made the agreement to keep these transactions separate and apart from all other business with, and financial obligations of Richfield. On this subject he stated:

> "I told Mr. Gilstrap, Mr. Eisenbach and Mr. Motherwell about my situation with the Richfield Oil Company, that it was on a commission basis, and that I had an interest in all the collections. I refreshed their memory that I had brought that up with them before and that I had elaborated on this to a great extent. * * * I reiterated all the statements that I had made to Mr. Gilstrap and Mr. Eisenbach with reference to the way I understood the agreement." (R. 350-1.)

Upon cross-examination he stated:

> "I brought up every argument on the agreement which I had with Wells Fargo with respect

> to the separateness and distinct part of the acceptance transaction with the Wells Fargo Bank. * * * Mr. Gilstrap stated that it was something that was beyond his control, that it was exercised on the instructions of Mr. Lipman, and that he had nothing to do with it whatsoever, and that it would have to be taken up with Mr. Lipman in order to have the banker's lien removed." (R. 364.)

These statements, according to Hall, were not denied. Hall testified:

> "They did not deny any of the statements which I made to them respecting the negotiations occurring at the time of the inception of this business or respecting the agreement with the receiver." (R. 351.)

This testimony of Hall was corroborated by Gilstrap upon both direct and redirect examination. (R. 387-410.)

The existence of this agreement was likewise given recognition by Gilstrap in his conversation with Hall had shortly after he had informed Hall of the cost of cabling the proceeds of the three Birla Bros. drafts to San Francisco during the course of which he told Hall what the bank intended to do. With respect to this conversation, Hall testified:

> "He stated that Wells Fargo Bank was going to grab that money. I asked him why and he stated that they were going to take it, exercising a lien on it for other indebtedness owed the bank. I stated that I was very surprised since they had agreed not to touch any of the collections of the foreign department of the Richfield

> Oil Company. He said he was sorry but that was the decision of the bank." (R. 350.)

It is unnecessary, however, to argue further that the agreement contended for was entered into because appellant itself removed the issue from controversy through Frederick L. Lipman, its president, who was called as a witness on its behalf. He was the officer to whom all the other officials of the bank referred in determining the credit which should be extended to the Richfield Company on its foreign collections. To him Hall was finally brought after conferring with Gilstrap and Hellman. That the agreement testified to by Hall was in fact made is demonstrated by the testimony of Lipman as follows:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the foreign department and not the general treasury relations of the company, *and he did not want the two mixed up; he wanted them kept separately.*" (R. 449.)

This testimony of Mr. Lipman is corroborated by Frederick J. Hellman, vice-president of appellant in charge of the Foreign Department. (R. 436.) Upon direct examination, he stated that after he and Mr. Hall had had some brief conversation with Mr. Gilstrap, he took Mr. Hall downstairs to the office of Mr. Lipman, and that he remained there during the conversation which ensued. (R. 436.) Testifying to what the conversation was, he states:

> "As I remember it, we then stood up and were going out the door, and Mr. Hall said to Mr. Lipman, *'Mr. Lipman, I want it understood'*—

> NO, NOT THAT. He said, 'You must realize that I am not in the financial end of the business; that I am only the manager of the foreign department, and I will have to get the consent of my superiors to put this credit through.' He further said that he knew we were giving them a line of credit of $625,000, and that if this acceptance credit was going to interfere with the loan line downstairs, he knew they would not consent to it, and he wanted the acceptance credits separate from the loan downstairs." (R. 438.)

Before passing to the cross-examination of this witness upon this subject, we believe it proper to direct the court's specific attention to the rather significant language of Mr. Hellman, in which he started to narrate what Mr. Hall said to Mr. Lipman, viz.: "Mr. Lipman, I want it understood—" and then suddenly corrected himself, saying, "No, not that." A brief examination of the testimony of Hall will show that the language used by Mr. Hellman and then repudiated by him is almost identical with the language which Mr. Hall claims he used in his preliminary statement to Mr. Lipman. (R. 343.)

On cross-examination, Mr. Hellman testified:

> "Mr. Hall said that he wanted these acceptance transactions to be considered separate from the loan line. * * * *He used the word 'separate', and he referred to the loan of $625,000. The essence of the statement is that he wanted it considered separate from the loan line of $625,000."* (R. 445-6.)

In view of the testimony of Lipman substantiating the testimony of Hall and Pope bearing upon this

subject and the corroborating testimony of Hellman, whether the so-called Hall agreement asserted by appellee was actually entered into is no longer within the realm of speculation.

Hall agreement given recognition by subsequent conduct of appellant bank.

But aside from this conclusive evidence establishing the making of the agreement, the subsequent conduct of appellant clearly establishes that until May 8, 1931, when, under circumstances referred to at a later stage of this brief, it attempted to seize the proceeds of some of these drafts, the existence of the agreement was constantly given recognition by it. As already stated, the promissory note executed by Richfield Oil Company evidencing its unsecured obligation to appellant matured on October 10, 1930. Aside from the bank's letter of February 26, 1931 (Plff's. Ex. 107), to which reference will also later be made, no attempt was made by appellant to exercise its alleged banker's lien or right of set-off until May 8, 1931. In the absence of the agreement under discussion, at any time after October 10, 1930, appellant would have had the right to exercise its alleged banker's lien upon the drafts deposited with it for collection or its right of set-off against their proceeds. In making this statement, we are eliminating from consideration the agreement between appellant and the receiver and other bank creditors of Richfield, evidenced by the wire of January 16, 1931 (Plff's. Ex. 3), to which reference will be made later, but which is not here important.

Notwithstanding such alleged right, not only did appellant fail to exercise such banker's lien or right of set-off until May 8, 1931, but between October 10, 1930, and May 8, 1931, it credited to the account of Richfield Company and thereafter to the receiver, the net proceeds of certain drafts theretofore collected by it totaling $39,469.57. (Plff's. Ex. 117.) In this connection it should also be noted that of these sums, $31,719.99 was so credited without any request of any kind emanating from Richfield Company or its receiver. (R. 333-4.) The remaining $7749.58 was deposited to the receiver's account in accord with appellant's letter of March 5, 1931 (Plff's. Ex. 108) after the receiver had called its attention to its wire of January 16, 1931 (Plff's. Ex. 3), to which reference will be made in another subdivision of this brief.

During this seven-months' period, appellant kept in touch with and had full knowledge of Richfield's financial condition. During the whole of this period appellant undoubtedly was just as anxious to obtain payment of the unsecured indebtednes due it by Richfield as it was on May 8, 1931. Its failure to exercise its alleged banker's lien and right of set-off between October 10, 1930, and January 16, 1931, is directly traceable to its recognition of the so-called Hall agreement. Such failure after January 16, 1931, was due not only to the so-called Hall agreement, but because of its agreement evidenced by its telegram of January 16, 1931 (Plff's. Ex. 3), which, together with the circumstances under which on May 8, 1931, appellant seized the moneys here involved will later be given consideration.

It must be obvious to the court from the evidence to which reference has been made, that when the arrangements were made to turn over the Richfield's collections to appellant, it was understood by the representatives of the Richfield Company and the officials of the bank that the entire foreign business of the Richfield Company should be kept, and deemed to be, separate and apart from all other transactions and business with the bank(including Richfield's then unsecured indebtedness to the bank.

The drafts, the proceeds of which are herein involved, were deposited with appellant for collection only, and not under the acceptance agreements or as security for the acceptances.

That it was definitely agreed that only drafts having a maturity, and the proceeds of which would be received in San Francisco not later than one day in advance of the maturity of the acceptances, would be eligible or received for deposit under the acceptance agreements, and that none of the Birla drafts, having a maturity of 180 days, nor other drafts, unless meeting the requirement just specified, would be eligible for, or received as drafts, under any acceptance agreement, but on the contrary that these latter drafts should be deposited with the bank solely for the purpose of collection, is conclusively established by the evidence.

The determination of what securities were placed under the acceptance agreements cannot be ascertained from the agreements themselves. In neither agreement is any mention made of any draft or document

which by its terms is assumed to be the subject matter of the agreement. If the appellant had rested its case upon the agreements themselves without attempting to show by parol evidence the security to which their provisions applied, of necessity the court's determination would have to be adverse to appellant. The agreements were conspicuous by unfilled blanks. What securities were to be considered as being deposited under the acceptance agreements were, therefore, dependent entirely upon the understanding and intention of the parties as reflected by their negotiations and by conferences and conversations occurring between them at the inception of the transactions, as well as what was subsequently done by them. Although the agreements themselves do not disclose the identity or description of such securities, their respective provisions are entitled to consideration in connection with the oral evidence introduced for the purpose of enabling the court to determine whether, regardless of the maturity of the drafts, it was or was not the understanding of the parties that all drafts deposited should be deemed to be under and to be security for the acceptance agreements as well as the acceptances issued thereon.

Insofar as it is material to the question now under discussion, the terms of the agreement confirm and corroborate the claim advanced by appellee. It will be remembered that four groups of acceptances were executed and released by appellant, viz.,

Oct. 8, 1930	$115,000.00
Oct. 15, 1930	5,000.00
Oct. 21, 1930	10,000.00
Nov. 28, 1930	25,000.00

Each of the acceptances issued, by its terms, matured ninety days thereafter. It should likewise be noted that no acceptance was extended or renewed, and that no attempt ever was made to extend the maturity dates of the acceptances.

As these securities were not described or specified in the agreement, recourse was had to parol evidence from which it was clearly shown that certain drafts only were deposited under the agreement as security for the acceptances to be issued. To this security the bank necessarily looked to meet the acceptances upon maturity, and inasmuch as the moneys to meet the acceptances had to be on deposit in the bank a day in advance of the maturity thereof, the drafts upon which these moneys would have to be realized would necessarily have had to be payable and in the possession of the bank in advance of the maturity of the acceptances. (R. 261.)

Recourse to the evidence, however, shows that only the so-called short term drafts were understood and deemed to be under the acceptances, and that the proceeds of the drafts here involved represent moneys received by appellant upon drafts left with it solely for collection.

A. The character of drafts to be utilized as security under the acceptance agreement was specified and agreed upon.

As already indicated, the acceptance agreement itself is significantly silent with respect to the character, identity or description of the securities upon

which its provisions were to be fastened, or upon which the acceptances were to be based. To ascertain to what securities these agreements apply, consideration must be given to the oral testimony addressed to this subject. Upon this testimony, construed in the light of the surrounding circumstances and the subsequent conduct of the parties rested the trial court's determination with respect to the property which the parties understood should act as such security. In giving consideration to this evidence, the court should keep in mind that the sole purpose of the security was to assure appellant that the acceptances were secured, and that funds derived from such securities would be at its disposal in ample time to permit the acceptances to be liquidated when due. With the purpose thus sought to be accomplished by the parties before us, it must be obvious that drafts having a maturity longer than the maturity date of the acceptances would not be deemed available as securities out of which the acceptances would be paid when due, and that, therefore, a distinction should and would naturally be made between short term drafts and those coming within the category just mentioned.

The evidence upon this subject, however, clearly establishes that such distinction was in fact made, and that only the short term drafts were intended to be utilized as such security, while drafts not maturing until a date subsequent to the maturity date of the acceptances were deemed and understood to be deposited for collection alone.

With respect to this subject matter, Mr. Hall, in detailing the conversation had between himself and

Mr. Gilstrap upon his August visit to the bank, testified:

> "I discussed the situation of Birla Bros., its prominence and its financial standing. I believe I discussed whether the entire drafts on Birla would be available for acceptance purposes. He stated, as I remember it, that undoubtedly the sight drafts would be available, but he doubted that the 180-day drafts would be, on account of the length of time it took the draft to get over to India—about thirty days and then thirty days or so for the proceeds to return to the bank." (R. 344.)

Concerning this conversation, on cross-examination he testified:

> "I believe I discussed with him on that occasion what drafts would be deposited by Richfield under the acceptance arrangement. The substance of that conversation was that following out the use of short term acceptances—90 days—that all drafts would have to come so that they would mature prior to the maturing of the acceptances and be equal to or a little in excess of the acceptances." (R. 358-9.)

Between Hall's August visit and the visit of Hall and Pope on October 6, 1930, Gilstrap apparently had gone "deeper" into the matter and had probably conferred with some of his associate officials. This situation is made manifest from what occurred on October 6, where, with respect to the character of drafts to be utilized for security, Gilstrap had become definite and certain.

As to the conversation then occurring, Mr. Hall testified:

> "We had a general discussion in regard to the use of acceptances, as to maturity of the drafts on customers. In the conversation it was stated that ninety-day acceptances were the best to be used on account of the ready sale of the same. We discussed that all foreign drafts must be arranged so that the proceeds of the same would be in Wells Fargo's hands prior to the maturity of the acceptances." (R. 345-6.)
>
> * * * * * * *
>
> "We then discussed the shipment which was going forward to Birla Bros. and the 180-day drafts which were on that account. Mr. Gilstrap stated that those drafts would not be acceptable for two reasons: the length of time and also that he had received a credit report which they did not believe was sufficiently good to allow them to take it." (R. 346.)

This testimony was reiterated by him on cross-examination, where he said:

> "Mr. Gilstrap said the credit report showed that Birla Bros. was not financially strong enough and that the credit report was not good enough. He stated that on account of the length of time of the drafts and also on account of the report which he had received, they could not touch the 180-day drafts.
>
> "Mr. Leuenberger came into the conference and I asked him whether he could handle the 180 day drafts and he said he could not. He made some remark about the credit report, saying it did not look good. * * * I am under the impres-

sion that something was stated by Mr. Gilstrap that the drafts going under the acceptance forms would be distinctly set aside and placed in a line or marked as being under the acceptance agreement." (R. 361.)

The understanding testified to by Mr. Hall is likewise shown by the testimony of Mr. Pope, who came to San Francisco for the specific purpose of familiarizing himself with the arrangements made, as well as with the procedure to be pursued based upon such arrangements. (R. 260-1.) Speaking with respect to the conversations upon the subject of what drafts should be deposited for collection and what as security, he testified:

"Mr. Gilstrap told me that *the release of acceptances would have to be based on drafts the maturity date of which would be such that the funds would arrive in San Francisco before the maturity date of the bank acceptances.*" (R. 261.)

* * * * * * *

"Mr. Hall explained to Mr. Gilstrap the type of drafts in general that we took covering foreign shipments. The discussion was more or less based upon the general character of the drafts customary to each country." (R. 261.)

He then specifically referred to Birla Bros. Ltd. and after mentioning the volume of goods purchased from time to time by it, as well as its prompt payment therefor, the following occurred:

"We explained to Mr. Gilstrap our method of drawing on Birla Bros. We told him we drew on each shipment one-half of the total shipment

at sight and the other one-half at 180 days. The question came up as to whether we might base acceptances on both sets of drafts. He told us he would be glad to consider the sight draft, *but because of the length of time and because of the credit standing he could not consider the 180-day drafts on Birla Bros.*

We argued with him that we had never had any trouble with Birla Bros.—that they had always been very prompt pay and we urged him to let us use the 180-day drafts as the basis of bank acceptances, *but he refused.*" (R. 262.)

"I asked him as a matter of information whether it would be possible to utilize the 180-day Birla Bros. drafts as a basis for bank acceptances after a sufficient period had elapsed so that the proceeds might arrive in San Francisco within the 90-day period of prime commercial paper. He told me that it was a possibility only, and not to be seriously considered." (R. 263.)

And that the 180-day paper would only be taken for collection is also shown by this witness, who testified:

"Mr. Gilstrap told us that he would be glad to take the 180-day paper *for collection.*" (R. 263.)

As to the amount of drafts to be placed under the acceptance agreements, he further testified:

"He told us that we could not use the 180-day paper to base bank acceptances. He told us that it would be necessary to put up a sufficient amount of drafts in money to cover the bank acceptances. It would only be necessary to have enough from the proceeds of the drafts to cover the bank acceptances to be paid." (R. 263.)

This subject was again touched upon on cross-examination, where the witness testified:

> "To the best of my knowledge there was also an agreement that the 180 day drafts would be accepted *for collection only* and *not be used as a basis for the issuance of acceptances. The Richfield Oil Company was only required to deposit sufficient drafts, the net proceeds of which would satisfy the amount of the bank acceptances.*" (R. 314.)

He testified that the 180-day drafts were to be kept separate; that they were for collection only. (R. 316.)

And still further:

> "As I remember the discussion, Mr. Hall and I were trying to raise all the money that we could on the Birla Bros. respective shipments, and we asked Mr. Gilstrap if he could not issue acceptances against the whole shipment, and he said that he could not because the time of the 180-day draft was too long to be used as a basis for bank acceptances; that it would not be considered as prime paper. I believe he did at that time bring up the credit standing of Birla Bros. * * * The 180-day drafts, as I understood it, were definitely out, because they were too long." (R. 318-19.)

> "I believe that Mr. Gilstrap and Mr. Leuenberger said: 'We can not use as a basis for the amount of your acceptances the 180-day paper on Birla Bros.'" (R. 319.)

Without quoting further from the testimony of Mr. Pope upon this subject, we direct the court's attention to the evidence given by him upon redirect examina-

tion in connection with the various schedules contained in plaintiff's exhibit 117, where he not only specifically mentions the conversations occurring between him and Mr. Gilstrap, but likewise gives his understanding of the agreement entered into between the Richfield Company and the defendant bank on October 6, 1931. (R. 326-336.) To this schedule reference will hereafter be made.

In view of the fact that appellant's witnesses stressed the point during their testimony that appellant lacked faith in the financial stability of this company, it is rather difficult to conceive that it would have been willing to issue acceptances based exclusively upon the unsecured obligation of Birla Bros. plus the unsecured obligation of Richfield Oil Company.

Another most persuasive reason why the Birla Bros. 180-day drafts would not be considered as security for the acceptances is that in bank parlance these drafts when accepted constituted nothing more or less than "clean paper" representing an open indebtedness, unsecured in any manner. (R. 420.)

The existence of the agreement is further emphasized by the course of conduct and procedure pursued by Pope in connection with the deposit of the drafts. We have before noted that four groups of acceptances were issued. Before any of these acceptances were released, a sufficient number of *short term* drafts was deposited to take care of the acceptances. Upon this subject Pope testified:

> "Before release of acceptances was requested by the bank, Richfield Oil Company had on de-

> posit with the bank a sufficient number of *short time* drafts exceeding to some extent the total amount of the acceptances." (R. 307.)

From time to time Pope was required to ascertain from his records the drafts deposited as security for the acceptances and those on deposit for collection. In doing this he said:

> "The way I differentiated between drafts that were deposited under the acceptance agreement and drafts that were not deposited under the acceptance agreement was as follows: when I figured up my drafts at the time I requested the issuance of bank acceptances, I would have to have at that time enough drafts deposited at Wells Fargo Bank, the proceeds of which would pay promptly the bank acceptances." (R. 315.)

Later we will show that aside from the drafts upon which the acceptances totaling $25,000 were released, specific drafts were deposited for all acceptances previously issued. Pope, whose duty it was to keep a record of, and watch those drafts, from time to time made a report to Hall of the status of the drafts. And as the occasion required, Hall familiarized himself with the records thus kept by Pope.

For two months prior to his appointment as receiver, Mr. McDuffie was president of Richfield Oil Company. During this period, as well as while acting as receiver, he became informed in a general way of the agreement with the bank and the situation of the drafts. In the defendant's telegram of January 16, 1931 (Plff's. Ex. 3) it reserved its so-called banker's lien upon *"certain"* drafts. According to

McDuffie, the *"certain"* drafts referred to were the drafts which were under the acceptance agreement. As to his understanding of the drafts, McDuffie testified:

> "My understanding of the telegram was that they were reserving rights against certain specified drafts. It was my understanding that they were reserving their rights on the drafts of rather short life, the Birla Bros. drafts." (R. 225.)

> "I did not have the faintest idea the bank would reserve any right against anything except the acceptances; otherwise I should have taken the collections out of their hands long before that." (R. 226.)

> "When the answer of the Wells Fargo Bank came back, I understood that they were reserving a perfectly natural right to collect against those acceptances and that they were reserving their rights as against such drafts as might have been earmarked. I understood that specified drafts had been earmarked. I was advised of this by the accounting department of the Richfield Oil Company." (R. 229.)

And as indicating definitely that his understanding was that the long time drafts were not under the acceptances, he further testified:

> "I only knew generally that these four drafts, the major portion of them, were in the Wells Fargo Bank for collection." (R. 229.)

He further said that his reason for believing that he could withdraw the collections was:

"because my understanding was that *certain* drafts were there for collection only and were not under that agreement." (R. 231.)

And as indicating why he had made no specific inquiry prior to May, 1931, as to whether the collections could be withdrawn, he said:

"I doubt very much whether I made inquiry earlier than May of 1931 as to my right to withdraw the drafts because there was never the slightest doubt in my mind that there was any possibility that drafts for collection could be offset, drafts that were not under an agreement—the ordinary drafts." (R. 231.)

The information respecting the drafts came to McDuffie from various sources, his statement being:

"The information upon which I based my statement that I never had any idea that the bank could exercise any lien upon these drafts came from various sources. I cannot say exactly. I can only say that I had, myself, become firmly impressed with the idea that first of all there was no possibility of the bank asserting any lien against any drafts for collection, and also that the bank had not in its telegram reserved any lien of any character on ordinary collections." (R. 231-2.)

That there was no doubt existing in the mind of McDuffie at the time the bank notified him of its attempted seizure of the proceeds of the Birla Bros. drafts is further shown by McDuffie's testimony in which he said:

"At that time I understood and believed that the Birla Bros. drafts were on deposit with the

bank merely for the purpose of collection. I did not understand or believe that the Wells Fargo Bank was claiming the right to hold any of those drafts as security under any acceptance agreement. I did not at that time understand or at any time prior thereto understand or believe that any of those drafts that we tried to stop payment on had been deposited with the bank under either any acceptance agreement or for the security of acceptances issued or released by the bank." (R. 233-4.)

* * * * * * *

"I understood that the short term drafts were being held under the acceptance agreement and that the long term drafts were being held solely for the purpose of collection." (R. 234.)

"I understood that it (appellant's wire of January 16, 1931, Plff's. Exhibit No. 3) referred to such drafts as they were holding as security. I did not understand at that time that this telegram related to any drafts not held by the bank as security and understood by me to be held by the bank merely for the purposes of collection. In May 1931 when for the first time I attempted to revoke the authority of the bank to make these collections, it was my understanding that the bank merely held these drafts for collection." (R. 235.)

Whatever doubt might be entertained as to McDuffie's understanding was dispelled upon his recross-examination by appellant's counsel during the course of which the following occurred:

"My understanding is that the Wells Fargo Bank had at the time of my appointment as re-

ceiver *certain drafts for collection and certain drafts subject to an acceptance agreement as security for certain acceptances. It is not my understanding that they were certain drafts that were deposited and the whole thing was collateral for certain acceptances that were held by the bank.* My understanding was that the bank held certain drafts as collateral for certain acceptances pursuant to an acceptance agreement and that it held other drafts for collection." (R. 236.)

B. The drafts deposited for the release of acceptances totaling $130,000 were specifically identified and earmarked.

While the oral testimony introduced on behalf of appellee is itself convincing, the proposition that but certain of the drafts were deposited as security for the acceptances, and the remainder were deposited solely for the purpose of collection is demonstrated by appellant's correspondence. This correspondence not only identifies and earmarks the particular drafts deposited for the first group of acceptances totaling $130,000, issued and released by appellant, but likewise further identifies the particular drafts, the proceeds of which were in fact utilized in payment of the acceptances. This same correspondence also clearly indicates the character of drafts which were deemed by the parties to be eligible for use under the acceptances, and by its failure to refer to the so-called long term drafts definitely establishes that the parties never contemplated or understood that such drafts would be given consideration in the issuance of acceptances.

The persuasive force of this correspondence was readily recognized by appellant, as it must have been by the lower court. The futility of appellant's effort to combat or minimize the effect of this correspondence must be apparent. The communications in which specific drafts are mentioned are all referred to in schedule B. (Plff's. Ex. 117.) The "identifying" letters referred to were preceded by Mr. Lyons' letter of Oct. 13, 1930 (Plff's. Ex. 28) in which, among other things, it is said:

> "Our records show that we have with your good bank a draft reserve of $9,734.16 against which no acceptances have been issued."

Appellant's reply (written by Mr. Gilstrap) dated Oct. 15, 1930 (Plff's. Ex. 29), discloses how this reserve is computed, and it is there stated:

> "You mention that you have a draft reserve with us of $9,734.16. This figure covers the amount of your drafts Nos. 103009 and 103012 and the balance remaining on your Nos. 103006A and 103004, but evidently does not take into consideration your draft No. 103010, drawn on La Paz, Bolivia for $11,031.14."

In the response of Lyons to this last communication (Plff's. Ex. 30) it is clear that the Richfield Company is of the same understanding as was Gilstrap, because it is there stated:

> "In talking with Mr. Gilstrap Saturday, he informed us that we might use our collection No. 103010, your No. 46843 on La Paz, Bolivia, as reserve against acceptances. Under these circumstances, would you please issue an acceptance for $10,000 to mature in 90 days."

That the additional acceptance for $10,000 was issued upon the security of the La Paz draft is evidenced by the letter of Mr. Leuenberger, dated October 21, 1930 (Plff's. Ex. 31) in which he states:

> "We have *earmarked* same against your collection No. 46843 on La Paz, Bolivia."

It cannot be successfully argued that the earmarking of this draft was due to some inadvertence or misunderstanding on the part of Mr. Leuenberger, for the reason that plaintiff's exhibit 30 discloses that the suggestion that the $10,000 acceptance should be issued against that particular draft emanated from Mr. Gilstrap in his letter of October 15, 1930 (Plff's. Ex. 29) and was discussed by him during his trip to Los Angeles, shortly after the inception of these transactions. Furthermore, Gilstrap himself became familiar with the Leuenberger letter (Plff's. Ex. 31) because upon his return to San Francisco a letter was written by him to the Richfield Company (Plff's. Ex. 32) enclosing a copy of the bank's letter dated October 21, 1930 (Plff's. Ex. 31) which apparently had been lost in the mail.

It will be observed that no reference whatever was made to drafts 103005 and 103006B, being the two 180-day drafts of Birla Bros., Ltd., obviously because of the understanding that they were deposited only for collection, and because of their far distant maturity dates, they were not security for the issued acceptances. In this connection it might also be remarked that in none of the correspondence passing between the parties until May 8, 1931, when the drafts were

seized by the bank, was it asserted, intimated or suggested that any of the long term drafts were deemed to be under the acceptances. The absence of such suggestion is peculiarly significant.

After the issuance of the $10,000 acceptance on October 21, 1930, a number of drafts were deposited by the Richfield Company with appellant. By November 24, 1930 a sufficient number of short time drafts coming within the purview of the agreement had been deposited by the Richfield Company to enable it to obtain the release of additional acceptances totaling $25,000. Thereupon and not until then did the Richfield Company request the issuance of such acceptances. Its request is evidenced by its letter dated November 24, 1930 (Plff's. Ex. 33), in which, among other things, it states:

> "Will you be kind enough to issue these acceptances as of November 28. *This will give a reasonable allowance for delay in the remittance of draft payments.*"

The sentence in italics manifestly intended to convey the information that if the acceptances would not mature until ninety days after November 28, 1930, no question could arise but that the proceeds of the short term drafts then in the possession of the bank under the acceptance agreement would be available in satisfaction of the acceptances.

In addition to the correspondence just referred to, the letters from the bank, in which are mentioned the collection of drafts and the application of their proceeds in anticipation of the maturity of the accep-

tances, confirmed the agreement as contended for by appellee. Detailed references to this correspondence, including the drafts to which it refers, the gross and net proceeds of the drafts and to what acceptances the net proceeds were applied is shown in Schedule "D" (Plff's. Ex. 117) to which reference is made without further elaboration.

The mere circumstance that the proceeds of certain drafts deposited under the acceptance agreement were collected and deposited to the credit of the Richfield Company or its receiver is of no importance in this controversy. From time to time after the acceptances had been issued, drafts were deposited with appellant for collection. It became obvious to appellant that no necessity would exist to retain the proceeds of all drafts under the acceptance agreement, and that if there was a minor deficiency, when the payment date of any of the acceptances arrived, such deficiency would readily be made up by the Richfield Company or taken from the proceeds of drafts not under the agreement. The action taken by appellant in this regard, as well as the exact situation existing at the time of the crediting of such proceeds either to the company or to the receiver is disclosed by the schedules contained in plaintiff's exhibit 117, the contents of which are fully explained by the testimony of Mr. Pope. (R. 326-36.)

C. Appellant's conduct prior to May 8, 1931, is consistent with appellee's claim and inconsistent with the contention of appellant.

As before remarked, where a dispute arises with respect to an agreement entered into between the parties or its terms, the manner in which the parties acted under such agreement, as well as their conduct is sometimes conclusive evidence of the character of the agreement as well as the understanding of its terms by the parties. In the instant case it was established without contradiction that prior to the date of appellee's appointment as receiver of the Richfield Company, without any request emanating from the company, the bank collected certain of the drafts and credited the proceeds thereof to the account of the Richfield Company. This same course of procedure was pursued with respect to certain other drafts maturing and collected between February 26 and May 8, 1931.

D. The conduct of the officials and employees of the Richfield Company establishes the agreement as asserted by appellee.

The conduct of the officials and employees of Richfield with respect to the understanding had between the latter company and the bank is equally potent as establishing their understanding of the agreement, as well as the character of the agreement entered into. Whatever explanation may be made with respect to the conduct of appellant, as illustrated by its correspondence, by its actions and by its procedure, no dispute of any kind exists in the record respecting

the understanding of the Richfield Company and its officers and employees. The records kept by them, the correspondence emanating from them, the manner in which the collections were handled by them, and the circumstances under which releases of acceptances were requested, all prove that it was its and their understanding that only short time drafts, payable under the circumstances described should be deemed or treated to be under the acceptance agreement.

No agreement was made providing for any continuing credit under the acceptance agreement.

Realizing the futility of seriously contending that it was ever understood that all foreign collections, regardless of amount, should be deemed deposited under the acceptance agreement dated October 4, 1930, but more particularly that Birla Bros. 180-day drafts should likewise be deemed to have been deposited as security for acceptances, upon the trial of this action for the first time appellant claimed that *notwithstanding the provisions contained in the acceptance agreement,* it had been agreed that a continuing or revolving credit should be given Richfield Company not to exceed at any one time $150,000. In accord with this claim it was further contended that whenever any issued acceptances had been paid additional acceptances to the amount thus liquidated could and would be issued provided, of course, there was ample credit on deposit to insure payment of such acceptances.

Considering the wants and necessities of the Richfield Company and the number and amount of drafts

deposited for collection, it is indeed surprising that, if any such agreement existed, no additional acceptances were requested by the Richfield Company. This is peculiarly significant when it is remembered that the first group of acceptances totaling $115,000 was paid in full on January 6, 1931; that a sum sufficient to liquidate these acceptances had been deposited to the credit of the acceptance fund long before such date, and that between January 6, 1931, and the date of the appointment of the receiver, the Richfield Company was in dire financial straits. For these reasons alone the claim thus advanced by appellant is incredible of belief.

But that the claim thus made is entirely destitute of merit and lacks any tangible basis is proven by reference to the answer filed by appellant herein, in which it is asserted:

> "With respect to the agreement under which said drafts were deposited, defendant avers *that the only agreement* between said Wells Fargo Bank & Union Trust Co. and said Richfield Oil Company of California, a corporation, with respect to the deposit of said drafts and the collection and disposition of the proceeds thereof was as set forth in two certain written agreements each designated 'acceptance agreement' duly executed by said Richfield Oil Company of California, a corporation, and addressed to Wells Fargo Bank & Union Trust Co., prior to the receipt or acceptance of said drafts, said acceptance agreement being dated respectively October 4th and November 28, 1930 * * * That true copies of said acceptance agreements, being the sole contracts between the Richfield Oil Company

> of California, a corporation, and said Wells Fargo Bank & Union Trust Company with respect to the deposit of said drafts and the collection thereof and the disposition of the proceeds thereof are hereto attached, expressly made a part hereof, said acceptance agreement dated October 4, 1930, being designated and marked Exhibit 'A' and said acceptance agreement dated November 28, 1930 being designated and marked Exhibit 'B'." (R. 104-5.)

These averments in substance are repeated from time to time in subsequent portions of appellant's answer. Nowhere in its answer is it asserted or suggested that any agreement existed between Richfield Company and appellant with respect to said drafts other than and excepting said two acceptance agreements.

The two agreements referred to are identical in form. Their language is plain, definite and free from ambiguity. Their examination will disclose that nowhere is it provided that there shall be any "continuing or revolving credit" or any credit excepting the original $150,000 in the one agreement and $5000 in the other. In fact, however, as has already been stated, each agreement assumes the contemporaneous deposit of the securities to which the provisions relate. That each of the agreements is barren of any suggestion relating to a continuous or revolving credit is not only apparent from its reading, but was testified to by Gilstrap, who said:

> "There is nothing in the acceptance agreement wherein anything is said about a continuous guaranty or revolving fund." (R. 402.)

Preliminarily it may be stated that inasmuch as the provisions of these agreements, because of their clarity, cannot be varied or contradicted by parol, the claim of a continuous or revolving credit cannot be given consideration.

But even assuming, for the purposes of argument, that this defense is within the issues raised by the pleadings and can be established by parol, a consideration of the evidence found in the record disproves the verity of any such contention.

A. The conversations and the negotiations between the parties negative the claim.

It will be remembered that upon cross-examination Gilstrap definitely testified that no conversation occurred between him and Hall upon this subject during the August visit, and that the only time it was touched upon was upon the October 6th visit of Hall and Pope and that it was not discussed on Hall's visit of October 8, 1930. (R. 411.) It will be noted that the conversation occurring on October 6th was AFTER Pope had delivered to him the written agreement and the accompanying contemplated acceptances. (R. 371.)

Assuming that continuous credit was mentioned, or even discussed, aside from the positive denials of Hall and Pope respecting any such agreement, to which reference will hereafter be briefly made, it must be apparent that no such agreement could have been or was made. The written acceptance agreement had not only been executed by the executive officers of the Richfield Company having authority to make

such agreement, but it had actually been delivered before any of these conversations occurred, and the record is entirely lacking in evidence indicating that either Hall or Pope was authorized to modify any of its provisions. But, in any event, it is clear that Hall never made any agreement with appellant respecting continuous credit. (R. 365.)

Later we will point out that aside from the conversations, the conduct of each of the parties negatived any such understanding.

Pope, who appellant admits was brought up for the express purpose of familiarizing himself with the mechanics as well as the details of the contemplated transactions, was positive that there was no such agreement. Upon this subject he testified:

> "I do not remember any discussion with the Wells Fargo Bank & Union Trust Co. about a revolving credit or a continuous credit. I do not remember Mr. Hall telling me that the bank had granted a credit to Richfield Oil Company of $150,000.00 on banker's acceptances and that this was to be a continuing credit or a revolving credit to be covered by one agreement. This was not my understanding of the transaction. I had no discussion with Mr. Hall about it. * * * It is my understanding that if we had issued the initial $150,000.00 of bank acceptances which we brought up it would be necessary to make out a new acceptance agreement." (R. 313.)

The fact that Pope was informed that it was impossible to fill in the blanks contained in the agreement because from time to time they would be de-

positing drafts under the agreement all of which could not then be identified, has no bearing whatever upon the question of continuous credit. It was intended to issue acceptances to the extent of $150,000. It was also intended to deposit specified drafts as security for such acceptances. Inasmuch as the drafts to secure the acceptances for $150,000 were not available under the agreement when it was delivered, obviously the drafts could not be identified in the agreement. Such suggestion, however, does not disclose that any continuous credit was intended or actually agreed to, or was in the minds of the parties. The non-existence of any such agreement is conclusively proven by evidence aside from the conversations of the parties.

Emil Leuenberger, one of appellant's witnesses, did not participate in any conversations with Pope or Hall while in the bank respecting a continuous credit, but testified on direct examination that while at lunch with Pope he explained to him the mechanics of the acceptances and "about" the revolving nature thereof. (R. 430.) His conversation, if it occurred, was merely explanatory and it is not claimed rose to the dignity of an agreement. In this connection, however, it will be remembered that this was the witness who wrote the so-called "ear mark" letter earmarking the La Paz draft of $11,031.14, against the $10,000 acceptance. This communication is not only inconsistent with the so-called revolving fund theory, but likewise discredits the claim that all drafts were under the agreement.

An examination of the testimony given by Hellman, as well as Lipman, cannot be contorted into any agreement for continuous credit. Mere references to a line of credit could not establish the agreement claimed. Furthermore, these latter conversations occurred with Hall in August before the acceptance agreement was executed and, inasmuch as it related to a subject-matter covered by the provisions of the written agreement, merged in that agreement.

B. Correspondence of the parties.

On November 24, 1930, the Richfield Company requested the issuance of acceptances amounting to $25,000. At that time acceptances aggregating $130,000 had already been issued under the acceptance agreement, leaving $20,000 still available. To cover the additional $5000 requested, a further acceptance for that sum was transmitted to appellant. (Plff's. Ex. 33.) On November 28th the acceptances for $25,000 were issued by appellant and the net proceeds credited to the account of the Richfield Company. (Plff's. Ex. 35.) On December 1, 1930, appellant, through its assistant cashier, C. B. Clemo, wrote Richfield Company as follows:

> "As your Acceptance Agreement covering the execution of acceptances by us against your documentary export bills calls for $150,000, we are enclosing another agreement for $5000 to cover the acceptance for this amount executed by us November 28, in accordance with your letter of November 24.
>
> Please sign and return this form to us." (Plff's. Ex. 37.)

It will be observed that by this letter appellant definitely informed the Richfield Company that the acceptance agreement called for but $150,000 and that the execution of another agreement covering the additional acceptance for $5000 was essential. While it is true that under the continuous guarantee theory, such agreement would be proper for the reason that the maximum limit of credit under the original agreement had been reached, the point of the matter is that appellant's letter (Plff's. Ex. 37) fails to mention *continuous credit* and likewise fails to inform the Richfield Company that additional acceptances can only be obtained under the original agreement when some or all of the issued acceptances have been liquidated.

The non-existence of any continuous or revolving credit is further shown by the correspondence between the parties relating to the payment of the acceptances aggregating $25,000. It will be remembered that this group of acceptances matured on February 26th. Shortly prior thereto appellant had collected upon drafts deposited with it in anticipation of the above payment, $23,500.30, leaving a balance to be collected of $1499.70.

On February 21st appellee sent to appellant, attention W. J. Gilstrap, the following communication (Plff's. Ex. 105):

> "Enclosed you will find a Bank Acceptance for $1600 payable at 40 days sight, and an Acceptance Agreement, properly executed.
>
> We are forwarding these documents to you in order to make good the balance due of $1499.70

on the $25,000 of Bank Acceptances coming due the 26th. *If, however, in the meantime, you receive sufficient funds from draft payments to take care of this deficit, please return* these papers to us.

Thank you for your courtesy in this matter."

On the date upon which this letter was written all of the acceptances, excepting $25,000 had been liquidated in full and a sufficient sum was on deposit with appellant to meet the $25,000 acceptances, excepting $1499.70. It, of course, will be conceded that the appointment of the receiver terminated the right to any further credit under the acceptance agreement, but it is obvious that the officials of Richfield were not aware of this situation. *They therefore forwarded to the bank an acceptance accompanied by an acceptance agreement.* The response of appellant written and signed by Gilstrap upon this subject (Plff's. Ex. 107) is illuminating. Before this letter was written, the deficit had been collected. After writing the receiver, to that effect, the letter concludes:

> "We are returning herewith the acceptance form and the acceptance agreement which you forwarded with your letter of February 21 and which we shall not have to use." (Plff's. Ex. 107.)

It will thus be seen that in the only correspondence passing between the parties in which additional credit or acceptance agreements were referred to, nothing was mentioned indicating that any arrangement had been made for a continuing or revolving credit.

The general correspondence between the parties, however, is likewise important in connection with the proposition under discussion. Between October 6, 1930, when the acceptance agreement was delivered, and May 8, 1931, when the funds of appellee were seized, a mass of correspondence passed between the parties, most of which emanated from the very officers and employees familiar with the transactions here involved. Although much of this correspondence related to the deposit of drafts and the collection and disposition of their proceeds, not a single word was ever written by either party suggesting or intimating that any continuous credit had been agreed upon. Furthermore, nowhere in all of this correspondence is there an intimation that further credit was available to the Richfield Company under the original acceptance agreement, although on December 16, 1930, sufficient monies were on deposit with appellant to meet the $115,000 acceptances, and on January 6, 1931, they were paid in full.

C. Conduct of Richfield Company negatives continuous guarantee.

The first group of acceptances aggregating $115,000 matured and became payable January 6, 1931. On December 16, 1930, appellant had collected $119,850 which sum was deposited in anticipation of the acceptances to become due. On December 16, 1930, Richfield Company was advised in writing by appellant that this sum had been applied "in anticipation of maturing acceptances." (Plff's. Ex. 93.) With this sum in the bank's possession, it becomes apparent that if a continuous credit had been arranged, even though

the first group of acceptances had not been paid, Richfield could have readily obtained the release of additional acceptances to the extent of $115,000 at any time between December 16th and January 6th. But however this may be, the Richfield Company was in *dire distress* on January 6, 1931, and remained in such condition until after the appointment of the receiver. Yet, although upon appellant's theory at least as early as January 6, 1931, the Richfield Company could have obtained from the bank $115,000 upon additional acceptances, no application for such sum or any part thereof was made. This circumstance is not only persuasive but controlling that no agreement had been entered into for any continuous credit.

D. Payment of collections to Richfield negatives continuous credit.

Between the issuance of the original group of acceptances aggregating $115,000 and the appointment of the receiver, the proceeds of six drafts deposited with appellant were collected and the net amount thereof from time to time credited to the account of *Richfield Company.* (Schedule G; Plff's. Ex. 117.) These sums were thus credited without any request having been made therefor by any of the officials of Richfield Company.

These payments are inconsistent with the idea that an agreement existed for continuous credit. Had there ever been such an agreement or mutual understanding, before making these payments, it is fair to say that by every ordinary rule of the business world some correspondence would have been indulged in

between the parties in which mention would have been made of such an agreement.

We are, therefore, justified in concluding that this "continuous or revolving credit" theory was imported into this case for the purpose of creating an apparent foundation upon which to support appellant's claim that all—instead of "certain"—of the drafts were deposited under the acceptance agreements. It realizes that in the absence of such foundation its claim in this regard would be without color or substance. It must be clear, therefore, that no justification whatever exists for the claim that any continuous or revolving credit was accorded the Richfield Company.

Appellant bank waived its right of banker's lien and setoff as against all collections of Richfield Oil Company then in its possession excepting those specifically deposited under the acceptance agreements.

For some months prior to January 15, 1931, Richfield Oil Company was enmeshed in financial difficulties. It owed various banks a sum in excess of $10,000,000, no part of which was secured. (R. 205.) It was indebted in a large sum to a number of merchandise creditors, some of whom were pressing it for payment. It was only with much difficulty that it was able to meet payrolls, freight charges and current indebtedness due public utilities which could not be delayed. Litigation was threatened which, if commenced and prosecuted to final judgment, would result in sacrifice of the properties of the Richfield Company, prevent it from carrying on its business and

in all probability force it into bankruptcy. This distressing situation not only became known to most, if not all, of the creditors of the Richfield Company, but was made the subject of many conferences and much discussion, particularly among its bank creditors including appellant, to all of which it became obvious that unless such threatened litigation was prevented and the business of the Richfield Company permitted to go forward the indebtedness due to them, at least in major part, would become uncollectible. To avoid this result a receivership was determined upon and on January 15, 1931, in appropriate litigation instituted for that purpose, appellee was appointed receiver of Richfield Company. On the same day, in an ancillary proceeding instituted in this district, appellee was appointed ancillary receiver to take charge of the property here located. (R. 205-8.)

Each of the orders above mentioned appointed appellee receiver "of all the *property, assets and business* owned by or under the control or in the possession of Richfield Oil Company." (R. 90.) By the terms of each order the receiver was authorized "forthwith to take and have complete and exclusive control, possession and custody of *all of the property and assets* owned by or under the control of or in possession of the Richfield Company, real, personal and mixed, of every kind, character and description." (R. 92.) And the receiver was "authorized until the further order of the court to *continue, manage and operate the business of the defendant with full power and authority to carry on, manage and operate the business and properties of the defendant * * * to the*

end that the operation of the business of the defendant should not be interfered with or interrupted." (R. 93-4.)

While neither appellant, nor any of the other bank creditors of Richfield Company, was a party of record to the receivership proceedings, it is disclosed by the evidence without contradiction that they were instituted and the receiver appointed, if not as the result of their active cooperation, at least with their consent. It is quite apparent, therefore, that one, if not the principal purpose sought to be achieved by the receivership *was to enable the business of the Richfield Oil Company to be carried on in the expectation that as a result of such procedure the indebtedness, or a considerable part of it, due to its creditors would ultimately be liquidated.*

Immediately after his appointment and qualification the receiver transmitted to the various banks with which the Richfield Company had been doing business and in each of which it maintained a commercial account, a copy of the order appointing him receiver, whereupon some of the creditor banks, in the exercise of their right of setoff, applied the cash balances then standing to the credit of the Richfield Company, in partial payment of such indebtedness. (R. 203-6.) Learning of such action and realizing that unless there was made available to him all *cash balances* and *all other credits belonging to Richfield in the possession of said banks,* it would be impossible for him to carry on its business, a meeting was called by the receiver to which representatives of all creditor banks were invited. This meeting was held on the morning

of January 16, 1931, and was attended by representatives of all creditor banks excepting appellant and First Seattle Dexter Horton Bank. (R. 205.) During the course of this meeting the receiver explained to those present its purpose and, according to his testimony, among other things, said:

> "I told the bankers at this meeting that the conditions were such that if they felt it was necessary to seize these balances, I, as receiver, could not carry on, and that the receivership must be immediately terminated and it would be necessary to go immediately into bankruptcy. **I told them that it was not only necessary that I have the balances restored but that I have their assurance that the normal flow of business would be allowed to go on. Collections were coming in of course. That if they merely restored my balances it would be obvious that it would be impossible to carry on the business if collections were seized. I asked them if they would not restore to me all funds that might be available.** I particularly brought that to their attention that after all the receivership was created to protect the estate and to carry it on, and that without funds it was utterly impossible to carry on the estate." (R. 206-7.)

> "I explained as thoroughly as I possibly could that it must be obvious to them that such a business as Richfield's was dependent upon the receiver having available all possible funds, that is, **all assets of every character,** so that the receiver might endeavor to continue the business in some operating form, and that without funds it was utterly impossible. Payroll checks had to be met and public utility charges had to be met

> once a month. Freight had to be met as it was incurred. A very large amount of the business of Richfield Oil Company was being done on credit." (R. 223.)

Edward J. Nolan, an executive of the Bank of America, the largest bank creditor of Richfield, was present at this meeting. According to his testimony:

> "Mr. McDuffie informed the assembled bankers that some of the banks had offset the balances as of the date of the receivership and stated to us that if the company were not to go into bankruptcy it would be necessary for him, as receiver, to have the necessary cash to meet public utility charges, railroad freight rates and labor charges, and that if the balances that had been offset were not restored or if the other banks would not consent not to offset the balances it would be necessary for the company to file a petition in bankruptcy or ultimately bankruptcy would result. He said all the **credits and all the funds and all the assets, especially the current assets,** that belonged to the company, must be turned over to him, otherwise he could not carry on the affairs of the company." (R. 241.)

That drafts deposited with the bank for collection, as well as the collections themselves, were *credits* and *assets* of Richfield Oil Company to which, as well as to the cash balances, the receiver was referring, is likewise shown by Mr. Nolan, his testimony upon this subject being:

> "I understand balances in a bank would be such items that are deposited for credit and collected, or if there is an agreement with the de-

positor that one may draw on uncollected items, we sometimes consider that as a balance. **I would regard foreign drafts deposited with a bank for collection as credits, and when the drafts are collected and the money comes into the possession of the bank I would regard that as cash balances.**" (R. 245-46.)

Upon cross-examination he testified:

"*Foreign drafts can be considered as credits.*" (R. 246.)

And on redirect examination:

"If a draft is deposited in a bank by a depositor or a merchant for collection, I would regard that as one of his credits. In the absence of any agreement to the contrary, if a foreign draft is deposited with a bank for collection and the bank collects the amount due upon the draft, I would regard that as a credit. When collection is made and the money comes into the possession of the bank it is a balance due the customer." (R. 247-8.)

It must be manifest from this evidence that while the receiver at this time was directly concerned with the restoration of the cash balances offset, and while he was insistent that other banks should agree not to offset cash balances, he required that all bank creditors should agree that **all assets and credits** in their possession belonging to the Richfield Company should be made available to him, or he would retire from the receivership, and the company would go into bankruptcy. That such was the understanding

of the bank creditors, including the appellant, was conclusively proved.

At the time of this meeting, while at least some of the banks had checks and credits in transit, the only banks which had foreign drafts in their possession were Security-First National Bank of Los Angeles and appellant. (R. 216.) These facts were known by the receiver and also by Mr. Hardacre, the representative of the Security Bank. It was agreed by the bankers present, as to some of them, however, subject to ratification by their respective banks, that if those banks which had offset the cash balances would restore such balances, and if all banks would agree to make available to the receiver all *credits* in their possession, none of the other banks would exercise their right of banker's lien or right of offset against any of the funds or credits of the Richfield Company. (R. 242.) Accordingly, at the conclusion of the meeting, a telegram was prepared by some of the bankers present, in cooperation with the receiver, to be sent to each of the banks for the purpose of carrying into effect the purpose sought to be accomplished by the meeting. In this connection it will be noted that among those participating in the preparation of the telegram was Mr. Ralph B. Hardacre, an official and representative of the Security-First National Bank, which had in its possession foreign drafts not yet collected. (R. 209-242.) This circumstance is of considerable importance for the reason that his understanding of the telegram (Plff's. Ex. 2), as well as the responses thereto, including the response of appellant (Plff's. Ex. 3) is shown by the action of the Security Bank making available

to the receiver not only its cash balances, *but all collections subsequently made by it upon these foreign drafts.* The telegram thus prepared and transmitted to the various banks including appellant is Plff's. Ex. 2 and reads as follows:

> "As receiver I am ordered by federal court to take *over all assets including cash* in banks Stop While you have undoubted right of offset such right if exercised would seriously cripple receivers operations It is necessary therefore to request that all banks restore to receiver full cash balances Stop Please therefore transfer such funds to a new account on your books in my name as receiver Evidence of my authority and signature cards will follow by mail Stop Local banks have indicated *they will acquiesce in this program.*" (R. 209.)

A mere reading of this telegram will disclose that the program referred to was the taking over by the receiver of *all assets including cash in banks.* The right of offset referred to is a right of offset as against "all assets including cash in banks." The program in which "local banks have indicated they will acquiesce" is the turning over to the receiver of all *assets including cash in banks.* It, therefore, clearly indicated to appellant that the agreement to be entered into was to turn over to the receiver *"all assets* of the Richfield Company including cash in its possession," and that as to such *assets* and cash its right of offset should be waived. But in order to prevent appellant, which had not participated in the meeting from misconstruing the telegram and to apprise it of what had occurred at such meeting, and what the re-

ceiver was insisting upon in order to prevent his retirement and bankruptcy on the part of Richfield, Mr. Nolan was requested by the receiver to communicate personally with appellant. Mr. Hardacre was likewise requested to perform a similar service with respect to the Dexter-Horton Bank at Seattle. (R. 242.) In this connection it will again be remembered that Mr. Hardacre, to whom was assigned this latter duty, was the representative of the Security Bank which subsequently turned over its collections to the receiver. Pursuant to such request, Mr. Nolan immediately telephoned to Mr. Eisenbach, one of the chief executives of appellant, stating that the purpose of the call was to

> "acquaint them with what took place at the bankers' meeting that day." (R. 242.)

As to what occurred between him and Mr. Eisenbach, Mr. Nolan testified:

> "During the course of my conversation with Mr. Eisenbach I stated to him *the substance of what had occurred at the meeting of the bankers.* I recall explaining to Mr. Eisenbach that unless all of the banks were unanimous in returning the balances that it looked to me as though the company would have to go into bankruptcy; that Mr. McDuffie had stated to us that he had to have certain funds to take care of public utility charges, labor charges and freight charges." (R. 243.)

Upon cross-examination he testified that the telegram was the work of about twelve of them (R. 245) and

"It was intended to be the agreement with the bankers *with some amplification,* and I think that is why Mr. McDuffie suggested that we get in touch with Mr. Arnold of Dexter-Horton and Mr. Eisenbach of Wells Fargo. The amplification was not that something was desired besides the telegram itself, but to explain to banks not present the dire condition of the company and the importance and necessity of returning the balances at once, or else the company would be forced to go into bankruptcy." (R. 245.)

Upon redirect examination he further testified:

"As stated in cross-examination, the primary reason for telephoning Mr. Eisenbach was to elaborate upon the wire that was prepared by the bankers in cooperation with Mr. McDuffie and to explain the dire condition of the receivership; that if the balances were not restored or if the bankers' liens were to be exercised by the different banks that it would be necessary for the company to go into bankruptcy. * * * *I told Mr. Eisenbach that it would be necessary that the receiver have all the funds of the Richfield Oil Company for the purpose of continuing the business and to avoid bankruptcy.* Mr. McDuffie went to great length in explaining to all of us that obligations from day to day arose in the Richfield Oil Company that had to be liquidated in some way. I tried to pass that on to Mr. Eisenbach, *I tried to pass on to Mr. Eisenbach just what took place at the meeting that morning."* (R. 246.)

Comment is made by the appellant upon the fact that it had no representative present at the meeting between the banker creditors and McDuffie and there-

fore it could not be charged with knowledge of the occurring discussions. This evidence was not offered or admitted for that purpose. It was introduced for the limited purpose of showing the foundation of the agreement and likewise to disclose that the consideration for the waiver on the part of appellant was, among other things, the agreement on the part of the other creditor banks (aside from the Security Bank) to restore balances already offset, and, as to the Security Bank, to restore the cash balances already offset and turn over to the receiver the foreign collections then in its possession as and when they were received, without exercising thereon its banker's lien and right of setoff. (R. 240.)

Nor has appellant appreciated either the purpose sought to be accomplished by the conversation shortly thereafter held between Nolan and Eisenbach or the information conveyed to the latter by Nolan.

If the receiver had merely been interested in the cash balances, or if Hardacre, of the Security Bank, had not been interested in learning that the foreign collections in the possession of the appellant bank would be made available to the receiver, no reason would have existed for the conversation between Nolan and Eisenbach. In this connection it will be remembered that the only two banks in which foreign collections had been deposited were the Security Bank and the appellant bank, and that the purpose of the conversation, as explained by Nolan, was

> "to acquaint them (executives of appellant bank) with what took place at the bankers' meeting that day." (R. 242.)

The testimony of Mr. Nolan is unopposed. It is true that Mr. Eisenbach testified that he had no recollection of the conversation, but he also added that he would not testify that it did not occur. (R. 452.) Mr. Eisenbach's failure of recollection is peculiarly significant with respect to this all-important conversation. That it actually occurred cannot be seriously denied. Why he failed to recall it is, in our judgment, inexplicable, particularly when we consider that he testified that he dictated a memorandum of all important conversations or conferences. (R. 454-5.)

After receipt of Plff's. Ex. 2 *and after the conversation between Nolan and Eisenbach had occurred,* appellant prepared and sent to the receiver its response. (Plff's. Ex. 3.) It is again significant that this telegram was prepared and signed by Mr. Eisenbach with whom Nolan had shortly theretofore conversed. This telegram reads as follows:

> "Replying telegram we are willing to restore in your name as receiver original balances in checking account provided we are notified by you that all company banks have taken similar action Stop We are holding *certain* collections as security for acceptances Please understand that we *continue* to reserve all our rights for bankers lien *against these collections.*" (R. 210.) (Italics ours.)

How, under the proven circumstances, appellant can expect to successfully claim that this telegram reserved to it its banker's lien on all foreign drafts then in its possession, we are unable to appreciate. At the time of its preparation, appellant had before

it the order appointing receiver containing the language above quoted (R. 203); it knew that the receiver, in order to carry on the business of the Richfield Company which was the purpose of his appointment, had to have available to him *all credits* and *funds* of the Richfield Company; it had before it the receiver's wire prefaced with the statement that

> "I am ordered by federal court to take *over all assets including cash in banks*"

and it had in mind the information given that very morning by Mr. McDuffie to the banks, as well as the discussions occurring at that meeting, the substance of which had been conveyed to it by Nolan. Furthermore, it had in its possession *certain* foreign drafts, described in bank parlance as *"collections,"* as security for the acceptances previously executed by it and then outstanding. Clearly the "banker's lien" to which it was referring as against these collections was whatever lien it possessed upon them as security for the acceptances. While it may be argued that the words "banker's lien" did not aptly describe the exact lien which the bank had upon such drafts, the information intended thereby to be communicated to the receiver undoubtedly was that it had issued certain acceptances, that it had in its possession certain collections as security therefor, and that as to THOSE collections it was reserving its lien as security for such acceptances. As we will hereafter point out, the technical meaning of a particular word falls as against the understanding and intention of the parties and the purpose sought to be achieved. Furthermore, the

court will note the use of the word *"certain"* which clearly indicated that only some of the collections theretofore deposited with appellant were under the acceptance agreements.

It is not at all reasonable that with the information which was conveyed to Mr. Eisenbach by Nolan, coupled with the information respecting the financial condition of the Richfield Company, which was possessed by appellant bank, it wrote the telegram (Plff's. Ex. 3) in which, among other things, it said:

> "We are holding *certain* collections as security for acceptances. Please understand that we continue to reserve all our rights to banker's lien against *these* collections."

Undoubtedly the officials of appellant by whom that telegram was prepared believed that the receiver had mentioned to the representatives of the bank creditors that collections had been deposited with it and that it in turn had issued acceptances secured by *certain* of these collections, which acceptances would shortly mature and would have to be liquidated in full. Undoubtedly appellant having, as Mr. Eisenbach testified, and as appellant admits, kept in close touch with the financial affairs of Richfield (R. 455) knew that certain foreign collections were or might still be in the possession of the Security Bank. Appellant desired McDuffie, as well as the other creditor banks, to know that these outstanding acceptances would have to be paid and, so that there might be no misunderstanding upon this subject, it added to its telegram the language above quoted. Indeed no other explana-

tion can logically be made. If the understanding of appellant was that the receiver was interested only in having restored the offset bank *balances* no necessity existed to add the trailer above quoted to its telegram, for the language:

> "Replying telegram we are willing to restore in your name as receiver Richfield's balances in checking account provided we are notified by you that all company's banks have taken similar action"

would have been wholly adequate. Furthermore, the language used in the concluding part of its telegram, upon which reliance is here made, would otherwise have been meaningless.

Not only was it the understanding of the appellant that by its telegram it merely reserved its lien upon those foreign collections deposited under the acceptance agreements, but undoubtedly such was the understanding of the receiver and of the bank creditors to whom the wire was read. Upon this subject, too, there is no dispute in the record. Mr. McDuffie, on cross-examination testified:

> "My understanding of the telegram was that they were reserving rights against *certain specified drafts.* It was my understanding that they were reserving their rights on *drafts of rather short life,* the Birla Bros. drafts. I do not know the exact drafts when I used the words 'certain drafts.' I did not know in detail what drafts were referred to. * * * I did not have the faintest idea the bank would reserve any rights against anything except the acceptances; otherwise I should

have taken the collections out of their hands long before that." (R. 225-6.)

"The agreement between the banks as I understood it was that our funds of all character would be available to the receiver." (R. 226.)

"When the answer of the Wells Fargo Bank came back I understood that they were reserving a perfectly natural right to collect against those acceptances *and that they were reserving their rights as against such drafts as might have been earmarked.* I understood that specified drafts had been earmarked. I was advised of this by the accounting department of the Richfield Oil Company." (R. 229.)

"I recall testifying this morning that if I had thought there was at any time in the minds of the Wells Fargo Bank the thought that they could take drafts that were deposited there for collection and offset them, or that they were reserving rights against any drafts that were there for collection, that I certainly would have endeavored to take them out. I did not know that that was impossible because my understanding was that *certain drafts were there for collection only and were not under that agreement.* I understood that it could be done. I doubt very much whether I made inquiry earlier than May of 1931 as to my right to withdraw the drafts because there was never the slightest doubt in my mind that there was any possibility that drafts for collection could be offset—*drafts that were not under an agreement*—the ordinary drafts." (R. 231.)

"The information upon which I based my statement that I never had any idea that the bank could exercise any lien upon these drafts came

> from various sources. I cannot say exactly. I can only say that I had, myself, become firmly impressed with the idea that first of all there was no possibility of the bank asserting any lien against any drafts for collection and also that the bank had not in its telegram reserved any lien of any character on ordinary collections. * * * It became firmly imprinted in my mind and it was an extraordinary experience to me when the bank exercised it later because I thought there was no possibility of its being done." (R. 231-2.)

Still later he testified:

> "With respect to that part of Plaintiff's Exhibit No. 3 which is the response made by the bank to my wire of January 16th, reading as follows: 'We are holding certain collections as security for acceptances. Please understand that we continue to reserve all our rights for banker's lien against these collections,' I understood that it referred to *such drafts as they were holding as security.* I did not understand at that time that this telegram related to any drafts not held by the bank as security and understood by me to be held by the bank merely for purposes of collection." (R. 235.)

That the banks likewise so understood the telegram is shown not only by the protests voiced by them when appellant summarily seized the proceeds of the drafts here involved, but likewise by the action of the Security Bank in thereafter turning over to the receiver the proceeds of drafts in its possession at the time of his appointment. With respect to such protests, Mr. McDuffie testified:

> "I have heard some of those bankers voice their protests against the action taken by the Wells Fargo Bank in attempting to exercise the banker's lien or right of set-off against collection of those particular drafts. Every banker with whom I discussed it protested. Some of them voiced such protests not only in my hearing and presence, but likewise in the hearing and presence of Mr. Ward Sullivan and Mr. Roche." (R. 233.)

That the Security Bank credited the receiver with the collections from drafts in its possession at the time of his appointment is also shown by Mr. McDuffie, his testimony being:

> "I know that the Security-First National Bank had drafts for collection and that the collections as made were credited to the account of the receiver." (R. 235.)

This subject-matter was also testified to by Mr. Pope, his testimony being:

> (The Schedule) "refers to five drafts deposited by Richfield Oil Company before receivership aggregating $152,524.03. This sum was collected by Security-First National Bank after the appointment of the receiver and after the receipt of the telegram of January 16, 1931 by the bank and after all of the other banks had sent in their telegrams, which proceeds were paid over to the receiver by Security-First National Bank. These drafts had been deposited by the Richfield Oil Company with that bank for collection only." (R. 335.)

Appellant seems to derive some comfort from the circumstance that in the replies sent to the receiver's

telegram by the various banks to which the telegram was sent, reference is made only to the cash balances. (App's. Br. 11.) However, it is only necessary to remind the court that in none of these banks excepting the Security Bank had any collections been deposited, nor were there any assets or securities belonging to the Richfield Company in the possession of these banks other than and excepting cash balances. Obviously, the reply of each of these related exclusively to such cash balances because they constituted the only assets or credits of the Richfield Company in their possession. The Security Bank was located in Los Angeles. Its representatives were constantly in touch with the Richfield Company and, after the appointment of the receiver, Mr. Hardacre, its principal representative, was present at and participated in the meeting of January 16, 1931, and likewise assisted in framing the telegram which was transmitted by the receiver to the various banks.

Mr. Hardacre's understanding of the response sent by appellant to the receiver (Plff's. Ex. 3) is demonstrated by the action of his bank in not only restoring cash balances in excess of $40,000 (Plff's. Ex. 9), *but in thereafter crediting to receiver's account collections aggregating $152,524.03,* upon all of which, in the absence of the agreement contended for, it had the right to exercise its right of banker's lien and setoff.

The letters immediately thereafter passing between receiver and the banks relating to the cash balances are of no significance because at that particular time they were dealing with nothing but the cash balances

that had either been restored or upon which the right of setoff was agreed not to be exercised.

As has already been pointed out, the understanding of the creditor banks of the agreement existing between them is convincingly established by their attitude upon learning of the seizure of the Richfield funds by appellant bank. Upon this subject Mr. McDuffie testified:

> "I told them, and I know that I told them, as it was an important item, and I considered that I had a distinct duty toward them and therefore I advised them explicitly in the matter; I considered that not only had the Wells Fargo Bank broken faith as far as the receiver was concerned, but it had broken faith with those banks, and I told them I would pursue to the utmost my endeavor to get that money returned, because I did not think that in any sense of the word Wells Fargo had any right to do it. I explained the situation as best I could, how it all came about. **Everyone of them protested. Not only that they felt there was no right in it, but that they themselves never would have restored their balances had they thought Wells Fargo was reserving in its mind this character of right.**" (R. 237.)

(a) The practical contemporaneous construction by the parties to the agreement evidenced by the telegram of January 16, 1931, should be a guide to the court in its interpretation.

Where the meaning of an instrument is in doubt, or where its terms are to some extent ambiguous, or where it is susceptible of two or more interpretations,

and where the parties are not in accord with respect to its meaning, the contemporaneous construction of all of the parties as evidenced by their conduct and actions with respect to the subject matter of the agreement is admissible for the purpose of establishing what was in fact their understanding and intention. As we will quickly point out, until May 8, 1931, judged by the conduct of the parties, no discord existed between them respecting the meaning of appellant's telegram of January 16, 1931. (Plff's. Ex. 3.) The contention that such practical contemporaneous construction is an appropriate guide to the action of the court in construing such telegram and in determining the understanding and intention of the parties is supported by numerous authorities. Among the many, we cite:

Keith v. Electric Engineering Co., 136 Cal. 178-181;

Mayberry v. Alhambra Co., 125 Cal. 444-6;

Rosenbaum v. Robert Dollar Co., 31 Cal. App. 576;

Hill v. McKay, 94 Cal. 5-20;

Stein v. Archibald, 151 Cal. 220;

Rockwell v. Light, 6 Cal. App. 563-5.

This proposition deals *first,* with the conduct of appellant; *secondly,* with the conduct of the receiver of Richfield Oil Company; and *thirdly,* with the conduct of the bank creditors other than appellant.

(b) Appellant itself construed its telegram of January 16, 1931, as reserving a lien only upon the drafts under the acceptances.

The receiver was appointed on January 15, 1931. On February 26, 1931, the last group of acceptances, totaling $25,000, was paid in full. By February 14, 1931, in anticipation of these acceptances, appellant had applied the net proceeds of certain drafts collected by it totaling $23,500.30. The difference between this sum and $25,000 was $1499.70. This sum appellee endeavored to make up by the issuance of a draft for acceptance by appellant and the transmission to it of a new acceptance agreement, both of which were subsequently returned to appellee unused. (R. 302-304.) Between February 14 and February 26 the appellant collected four drafts, the net proceeds of which aggregated $9249.28. From this sum on February 26, 1931, it deducted $1499.70 which, with the funds previously collected, paid the acceptances in full. Appellant then had remaining in its possession $7749.58, the proceeds of these foreign collections. With respect to this sum, by letter dated February 26, 1931 (Plff's. Ex. 107) appellant advised appellee:

> "The remainder of the proceeds totaling $7,749.58 we are holding in accordance with notice given you by our wire of January 16th."

Thereafter and on March 2, 1931, appellee, understanding as he did that by the wire referred to, appellant had reserved its lien upon *"certain"* drafts being the drafts under the acceptance agreement, and being unable to appreciate upon what theory appel-

lant claimed the right to hold such proceeds, wired appellant (Plff's. Ex. 109) requesting it to repeat to him its telegram of January 16. On the same day by telegram, appellant repeated its wire of January 16. (Plff's. Ex. 110.) Upon receipt of this wire, appellee undoubtedly compared it with appellant's original telegram of January 16 (Plff's. Ex. 3), and realizing that there was no difference in the wires and being convinced that appellant had no right to retain the proceeds of these drafts under its reservation contained in its wire of January 16, on March 3 wrote appellant the following letter (Plff's. Ex. 108):

> "Referring to your letter of February 26th, advising us of payment of certain drafts totaling $9260.81, less certain charges amounting to $11.53, leaving a balance of $9249.28 from which you are taking $1499.70 to meet the balance due on acceptances February 26th, leaving the sum of $7749.58 to be credited to our account, and referring to your telegram of January 16th, I beg to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15th, 1931, to the credit of William C. McDuffie, Receiver. I will therefore appreciate it if you will kindly credit the remainder of the proceeds so mentioned above $7749.58 to the credit of Richfield Oil Company of California, William C. McDuffie, Receiver, and advise us as soon as this transfer has been made." (Plff's. Ex. 106.)

Thereupon and on March 5, 1931, *without any other communication passing between appellee and appellant,* appellant credited the receiver's account with

$7749.58 and wrote to appellee the following communication:

"March 5, 1931.

We refer to your letter of March 3 regarding funds received representing proceeds of collections.

In accordance with your request, we are crediting the account of William C. McDuffie, Receiver, Richfield Oil Company of California, with the sum of $7749.58.

We are also crediting this account with $11,082.51, representing proceeds of collection No. 13,106 of the Richfield Oil Company of California, particulars as per memorandum attached.

Yours very truly,"

It must be obvious to the court that upon the language of the wire of January 16, 1931, being called to the attention of the appellant and its consideration of the circumstances under which it was prepared and the purpose sought to be achieved by the receiver as well as all bank creditors of Richfield Company in negotiating the agreement, that it realized that the receiver was entitled to the funds, and that it had no claim against them.

Furthermore, in the letter last quoted, reference is made to the collection of the proceeds of draft No. 13,106 for $11,107.50, the net proceeds of which amounted to $11,082.51. A reference to Schedule C (Plff's. Ex. 117) will disclose that this draft was deposited with appellant on January 9, 1931. It will also be noted that nowhere in Plff's. Ex. 106 is any reference whatever made either to this draft or to its

proceeds, and yet of its own initiative and in the absence of any request from appellee, appellant credited the receiver's account with the net proceeds of this draft.

Between February 26, 1931 and May 8, 1931, in addition to the four drafts first above mentioned and in addition to the net proceeds of draft No. 13,106, amounting to $11,082.51, the bank collected the proceeds of nine drafts, the net proceeds of which amounted to $15,381.62, and deposited each of these collections to the account of the receiver. The number, gross amount, net proceeds, date of deposit with appellant and date of payment of each draft are shown on Schedule H. (Plff's. Ex. 117.)

With respect to these collections the evidence shows without dispute that the net proceeds of each of these drafts was likewise credited to the account of the receiver *without any affirmative act or request upon his part or on the part of any of the officials of Richfield Company,* but solely upon the uninfluenced initiative of appellant. The total sum thus credited to the account of the receiver by appellant, representing the net proceeds of drafts deposited before his appointment, but collected thereafter, including the above mentioned sum of $7749.58, amounts to $34,213.71. (Schedule I, Plff's. Ex. 117.)

In connection with the subject matter under discussion, it will be noted by the court that every collection made by appellant between February 26, 1931, when the acceptances were paid in full, and May 8, 1931, was thus credited to the account of the receiver,

and that no banker's lien or right of setoff was attempted to be exercised as to any draft or its proceeds. It should also be noted that whenever a draft was collected, and its net proceeds credited to the receiver's account, a written advice of such action was transmitted by appellant to the receiver. In no instance during this period did appellant by letter, wire or word of mouth, assert, intimate or suggest to the receiver or any official or employee of the Richfield Company that it was reserving or claiming to reserve or had the right to exercise any banker's lien or right of setoff as to these drafts or their proceeds. It will further be noted that during this entire period of time, appellant had in its possession all of the drafts, the proceeds of which are here involved, including the three 180-day sight drafts on Birla Bros., and that at no time, by letter, wire or word of mouth did it assert, suggest or intimate that it was holding any of these drafts as security for the debt due to it from Richfield Company, or that it intended to subject any of these drafts to its alleged banker's lien, or that it contemplated or intended to offset the proceeds, or any of them, when collected, to such indebtedness.

In its discussion of the effect of the crediting of the draft proceeds to the receiver, appellant states:

> "Appellee further claims that appellant's conduct after the transmission of its telegram of January 16th has evidentiary force adverse to appellant on the question of waiver of lien. Appellee's contention in this respect is that the subsequent relinquishment by appellant to the receiver of some of the draft proceeds is evidence confirming

> the interpretation which appellee places on appellant's telegram of January 16." (App. Br. 134.)

It is undoubtedly true that such action did confirm "appellee's interpretation" of appellant's telegram, but it also demonstrates that the appellant bank did in fact agree to the waiver as claimed, because the crediting of these proceeds of the drafts to the receiver was and is convincing evidence that appellant had no claim upon the collections. It established such waiver by proving that its subsequent transactions were in harmony only with the existence of the waiver and inconsistent with appellant's present claim. Furthermore, it was evidence showing that appellant construed and understood its telegram (Plff's. Ex. 3) as a waiver of all collections which were not under the acceptance agreements.

Appellant would have this court assume that the collections made by it between January 16, 1931, and May 8, 1931, constituted moneys voluntarily restored by it to the receiver in the absence of any legal obligation requiring such credits. Aside from the other obvious infirmities of this claim it is out of harmony with the action subsequently taken by appellant. Regardless of what appellant asserts to the contrary, the financial condition of the Richfield Company was no different in May than it was in February. In fact, considering the character of tax which had to be paid in February, its financial distress was then more acute. The non-payment when due of property taxes only results in a lien upon the real property and not its immediate sale. Failing to pay the gasoline tax,

however, would bring about a forfeiture of the right of Richfield to further continue the sale and distribution of gasoline which was its principal business, the result of which would have been bankruptcy.

The statement of Eisenbach that the Richfield Company was in danger of bankruptcy in May was destroyed under his cross-examination and was clearly refuted by the evidence of Mr. McDuffie who was obviously more familiar with the receivership and its affairs than Mr. Eisenbach. Upon cross-examination the former said:

> "During the first year that I was receiver there was never a time when the Richfield Oil Company was not in dire need of cash, and it was necessary for me during that time to get in my possession as quickly as possible all available funds." (R. 235-6.)

Furthermore, the very fact that even though deprived of the funds that are here involved, which were so necessary to the business activity of the receiver, bankruptcy proceedings failed to result, is a complete negation of the unsupported claim of Eisenbach that in May, 1931, bankruptcy proceedings were believed to be imminent.

Appellant would have the court believe that in crediting appellee's account with the sum of $7749.58 on March 5, 1931, and the additional sum of $11,082.51 it was merely cooperating with the receiver and gratuitously bestowing upon him the aggregate of the two sums just mentioned. We are unable to appreciate the argument thus made nor do we understand how it can seriously assert that in

crediting these funds it merely "acceded to the request of the receiver." Until the receipt of appellant's letter of February 26, 1931 (Plff's. Ex. 107) appellee had not been advised that the collections referred to therein had been made. After stating that the outstanding acceptances had been paid in full, the letter proceeds:

> "The remainder of the proceeds totaling $7749.58 we are holding in accord with the notice given you by our wire of Jan. 16."

The natural import of this language was that they were retaining the sum of $7749.58 under a *claim of right* given recognition in its wire of January 16th.

If the receiver had understood Plff's. Ex. 3 as contended for by appellant bank, and he desired it to cooperate with him to the extent of permitting him to utilize these funds, *although having no right thereto,* he would have immediately written appellant bank to that effect. But the receiver engaged in no such conduct. He re-read the telegram (Plff's. Ex. 3) for the purpose of ascertaining whether he was mistaken in the construction previously placed upon it by him and finding nothing inconsistent with his understanding he assumed that the original contained some language omitted from the copy delivered to him. Accordingly he wired appellant bank to repeat its telegram of January 16th. Upon reading the repeated wire and realizing that he had not misunderstood the original (Plff's. Ex. 3) he wrote to appellant bank as already shown. (Supra p. 78.) This letter cannot be construed as a mere "request" for cooperation or a request that moneys to which the receiver was not

legally entitled should be gratuitously bestowed upon him. It was a plain, unvarnished and unambiguous statement that because the other banks had carried out their part of the agreement the receiver, *as a matter of right,* was entitled to the $7749.58. It was a declaration that by the language of Plff's. Ex. 3 the understanding of the receiver was that appellant had no claim of any kind to any of the collections not deposited under the acceptance agreements. According to the testimony of appellant, this letter was read not only by Gilstrap, to whose attention it was directed, but by the executives of the bank. They had either before them or in mind all of the telegrams passing between the parties, including Plff's. Exs. 2 and 3, and were advised that the request or demand of the receiver for the return to him of the $7749.58 was based upon *a legal right to such funds.* He did not go to appellant in the attitude of a supplicant begging for financial assistance to which he was rightfully entitled. He requested the return to him of the withheld funds upon the asserted claim that he was legally entitled thereto.

And did the appellant bank, when thus called upon to challenge the claim advanced by the receiver, if made without justification, advise him of any misunderstanding? Most assuredly not! It not only turned over to him without protest the $7749.58, but in addition thereto credited his account with $11,082.51 concerning which there had been neither correspondence nor communication. If any basis whatever exists for the appellant's contention that the $7749.58 was credited to appellee because of his request, it is

inconceivable why appellant should voluntarily turn over to the receiver the *additional* sum of $11,082.51 as to which no request had been made, and concerning the collection of which the receiver then lacked knowledge, excepting that the receiver was legally entitled to such funds.

Notwithstanding the persuasive character of the evidence just referred to, that Plff's. Ex. 3 should be interpreted as claimed by appellee is also conclusively established by the proof of claim of appellant filed in the receivership proceeding on March 28, 1931, before this controversy arose, by F. A. Raymond, one of appellant's principal officials. In the claim he is characterized as "vice president and cashier".

After describing the indebtedness due from Richfield Oil Company to appellant, which at that time amounted to $636,189.95, it is stated:

> "*that there are no offsets or counterclaims to said debt;* no notes or other evidences of indebtedness have been taken or received except those of which copies are hereto attached; no judgment has been rendered for such indebtedness or any part thereof; and no claim to preference in payment from the receivership estate is made; **that no securities are held by said claimant for said indebtedness.**" (R. 366-7.)

On the same date appellant filed in the receivership proceeding another proof of claim arising out of an indebtedness due appellant for services rendered as registrar. This claim was verified by A. J. Callahan its "assistant trust officer". In this latter proof

of claim, after stating the basis of the indebtedness, it is stated:

> *"that there are no offsets or counterclaims to said debt* * * * no claim to preference in payment from the receivership estate is made except as to a check for $846.50 and **that no securities are held by claimant for said indebtedness."** (R. 367-8.)

It is true that on or about May 19, 1931, ten days after appellant seized the funds herein involved and some days after the protest against such seizure had been made by appellee, an amended proof of claim was prepared and sought to be filed by appellant. (R. 464-5.) This amended claim, however, is lacking in evidentiary value, considering the time when and the circumstances under which it was attempted to be filed. No amended claim, however, was ever proposed or filed as a substitute for the proof of claim verified by Callahan.

(c) Receiver construed Plff's. Ex. 3 as reserving a lien only upon the drafts under the acceptances.

We have already commented upon Mr. McDuffie's understanding of the telegram of January 16, 1931 (Plff's. Ex. 3), and have called to the attention of the court the testimony given by him addressed to this subject. (Supra, pp. 70-72.)

We have shown that from time to time the net proceeds of the drafts not applied in anticipation of payment of acceptances were credited to the account of the receiver in appellant bank and utilized by the receiver in accord with the order appointing him

receiver. That he assumed that these collections and credits were in accord with the understanding reached between himself and appellant and the remaining bank creditors is evidenced from the circumstance that such procedure caused no comment on his part. While it might be asserted that this latter evidence was more or less negative in character, his understanding and interpretation of the telegram is demonstrated by the action taken by him the very instant that appellant engaged in conduct antagonistic to such understanding. The incident here referred to arose out of the statement contained in appellant's letter of February 26, 1931 (Plff's. Ex. 107) in which it was stated that the latter was holding $7749.58 "in accordance with notice given you by our wire of January 16th." The receiver's insistence that these net proceeds should be forthwith credited to his account because of the contents of appellant's telegram of January 16, 1931 (Plff's. Ex. 3) which must be taken in connection with the previous wire of appellee likewise dated January 16, 1931 (Plff's. Ex. 2) and the surrounding circumstances already mentioned, establish beyond question that the receiver understood that by its telegram, appellant continued to reserve a lien only upon the drafts actually under the acceptances. As has already been shown this understanding was confirmed by the subsequent action of appellant which, without objection, credited to receiver's account all of said proceeds. (Plff's. Ex. 108.)

It further appears that just as quickly as the receiver learned, on May 8, 1932, that appellant was claiming the right to retain the proceeds of the drafts

in question under its alleged banker's lien or right of setoff, he not only personally protested, stating what his understanding of the agreement was, but immediately sent Hall to San Francisco to insist that the position taken by appellant be reversed. His demand for the payment to him of the proceeds being refused, this litigation resulted. It, therefore, appears without conflict that continuously since the receipt of appellant's wire of January 16, 1931 (Plff's. Ex. 3) the receiver understood that appellant was merely reserving a lien upon the drafts under the acceptances, and that at no time by correspondence, word of mouth, act or conduct has he indicated that his understanding was otherwise.

(d) The bank creditors of Richfield likewise interpreted appellant's telegram of January 16, 1931, in accordance with the interpretation placed upon it by Receiver.

It has already been pointed out that the bank creditors of Richfield Company, fully conversant with its affairs and financial status, were insistent upon and brought about the appointment of the receiver, such appointment being required and made for the purpose of enabling the company's business to be carried on, its properties protected from sacrifice and to avoid bankruptcy. In the preceding pages of this brief we have shown that immediately after his appointment, the receiver, in conference with representatives of all of said bank creditors other than appellant, insisted that all offset cash balances be restored, and that the credits and balances of the Richfield Company in the

possession of said banks, including appellant, be made available to him, otherwise he would retire from the receivership, the result of which would precipitate bankruptcy. We have also called to the attention of the court the telegram sent by the receiver to the banks, including appellant, and that by way of elaboration of said telegram, and in order that appellant would have full knowledge of the circumstances under which it was written, and the purposes intended to be accomplished by the receiver, the substance of what had occurred at the meeting between the receiver and the bank creditors was communicated to appellant, and thereafter appellant transmitted to the receiver its wire of January 16, 1931. (Plff's. Ex. 3.)

It seems to us to be unnecessary to be obliged to argue that the purpose sought to be accomplished by the bankers, including appellant, by the agreement entered into between them and the receiver was *to enable the business of Richfield to be carried on.* This was, and necessarily had to be the *"spirit"* if not the body of the agreement. That such was the primary and principal object of the receivership is evidenced by the recitations contained in the order appointing the receiver.

Shortly after its receipt, Plff's. Ex. 3 was read to some of the banker creditors (R. 227), among others, Mr. Hardacre, representative of Security Bank. That these banker creditors interpreted Plff's. Ex. 3 in accord with the interpretation placed upon it by the receiver is made manifest not only because of the object sought to be attained, viz.: the continuance

of the business of Richfield, but from their subsequent conduct. At the time of the receiver's appointment, the Security Bank had in its possession for collection foreign drafts aggregating $152,524.03. Not only did it waive its right of offset against the cash balances belonging to Richfield then in its possession, but in addition thereto, as the proceeds of these drafts were collected, they were forthwith credited to the account of the receiver. This action on the part of the Security Bank is more eloquent respecting the meaning of appellant's wire (Plff's. Ex. 3) than any testimony that could be given by its representative. Furthermore, when the bankers learned of the action taken by appellant on May 8, 1931, they vehemently protested, their protests being bottomed upon the ground that such action was a clear violation of the agreement entered into between them, the receiver and the appellant. (R. 237.)

Use of word "basis" misconstrued by appellant.

Although it is evident from the testimony of Hall and Pope, confirmed and amplified by the correspondence, conduct and actions of the parties, that the definite understanding was that only short-term drafts should be under the acceptances, appellant claims that because upon occasions the word "basis" was used by some of the parties, what the appellant meant was that the short-term drafts would be used as the basis of the amount of the acceptances to be issued and not as the sole security to be taken by the bank to insure payment of such acceptances. The meaning of the

word "basis" when used by a witness necessarily must depend upon the meaning intended to be given to it by the person testifying. To ascertain such meaning reference should be had to all of the witness's testimony upon the particular subject-matter in connection with which the word "basis" was sometimes used. An examination of the testimony of both Hall and Pope will establish beyond any possible doubt that the agreement entered into between appellant and Richfield was as claimed by appellee and not as asserted by appellant.

The point here made can be readily illustrated by an extract from the testimony of Pope wherein he testified:

> "Mr. Gilstrap told us that he would be glad to take the 180 day paper for collection. He told us that we could not use the 180 day paper (upon which) to base bank acceptances. He told us that it would be necessary to put up a sufficient amount of drafts in money to cover the bank acceptances. It would only be necessary to have enough from the proceeds of the drafts to cover the bank acceptances to be paid." (R. 263.)

And again:

> "To the best of my knowledge there was also an agreement that the 180 day drafts would be accepted for collection only and not be used as a basis for the issuance of acceptances. The Richfield Oil Company was only required to deposit sufficient drafts, the net proceeds of which would satisfy the amount of the bank acceptances." (R. 314.)

And further:

> "We asked Mr. Gilstrap if he could not issue acceptances against the whole shipment and he said that he could not because the time of the 180 day drafts was too long to be used as a *basis* for banker's acceptances * * * that the 180 day drafts, as I understood it, were definitely out because they were too long." (R. 319.)

Lyons' letter (Def. Ex. A) is lacking in evidentiary value.

Appellant apparently attaches great importance to the letter of Lyons dated October 7, 1930. (Def's. Ex. A.) When consideration is given to the circumstances surrounding the writing of this letter, as well as to the purpose sought to be accomplished by it, coupled with the fact that Lyons had no connection with and was lacking in detailed knowledge of the transaction evidenced by the acceptance agreement, the conclusion is inevitable that it is of no importance or legal significance. The transaction in question was negotiated exclusively by Hall and Pope. Lyons at no time participated therein. The acceptance agreement, together with the unaccepted drafts amounting to $150,000 were delivered by Hall and Pope to Gilstrap on October 6th. At this time the Richfield Company was in dire financial distress and it was essential that funds be obtained at the earliest possible moment. On the evening of October 6th Hall and Pope returned to Los Angeles. On the evening of the following day Hall left Los Angeles for San Francisco bringing with him among other things the four Birla Bros. drafts together with transmittal letters. Ordinarily the two

transmittal letters, with the drafts and documents referred to therein, would have been transmitted to appellant by mail. If such had been the procedure the Lyons letter would not have been written. Hall came to San Francisco not because it was necessary that the transmittal letters, drafts and documents should be delivered personally, but to enable him to obtain forthwith the $115,000 in order that it could be utilized in Los Angeles before the night of that day. (R. 347-8.) To permit such use, upon the net proceeds of the acceptances being credited to the account of Richfield the deposit slip was telephoted to Los Angeles. Lyons was interested in getting the $115,000 and getting it quickly, and the letter was written by him with this object alone in view. The details of this transaction had already been agreed upon. The letter did not undertake to restate such details or to modify or restrict them in any manner, nor did it undertake to change, modify or alter the agreement already made. It was the character and type of letter that anyone under like circumstances would have written, the writer never imagining that it would subsequently be characterized as illustrative of the agreement existing between the parties. We are unable to comprehend the basis for the claim that this communication should be taken as a substitute for the negotiations previously conducted by the parties as well as for the agreement entered into between them definitely fixing their rights and obligations. That the appellant itself attached no importance to the letter is further evidenced by the circumstance that its contents were never discussed by the officials of the bank with any of the representatives of the

Richfield Company. A conclusive reason why this communication is utterly lacking as an important element in this case is that while it refers to "shipment" the evidence of all of the witnesses, including Gilstrap, a portion of whose testimony is above quoted proves conclusively that the agreement related to drafts and to nothing else. But that the Lyons letter is not susceptible of the meaning imputed to it by appellant and that the understanding of Lyons was exactly in accord with that testified to by Hall and Pope, and that whatever understanding he had upon the subject was that only short-term drafts were being deposited as security under the acceptance, the balance being sent to the bank for collection alone is conclusively proven by the correspondence dictated by Pope but read and signed by Lyons, the first written within six days after the letter stressed by defendant (Deft's. Ex. A) and the second written less than two weeks thereafter.

The first letter written by Lyons to appellant after the transmission of Deft's. Ex. A was dated October 13, 1930, and was as follows:

> "Our records show that we have in your good bank a draft reserve for $9,734.16 against which no acceptances have been issued.
>
> If this information is correct please issue one of the drafts which you now hold for $5,000 payable in 90 days.
>
> Thanking you for your courtesy in this matter." (Plff's. Ex. 28.)

This letter demonstrates that Lyons' understanding was not only that drafts, but that certain specified

drafts, had been deposited as security for the payment of the acceptances issued. No other construction can be given to the letter. Its language is clear, definite, positive and certain. But if any doubt whatever could arise as to its meaning and as to the understanding of Lyons it will be quickly dispelled by reading the latter's letter of October 20th. This letter was written while Mr. Gilstrap was in Los Angeles and after he had conferred with the officials of Richfield. (R. 349.) Because of the absence of Mr. Gilstrap it is addressed to Mr. Luenberger. There it is said:

> "In talking with Mr. Gilstrap Saturday, he informed us that we might use our collection number 103010, your number 46843, on La Paz, Bolivia, as reserve against acceptances. Under these circumstances, would you please issue an acceptance for $10,000.00 to mature in 90 days. * * *
>
> Your courtesy in this matter is appreciated." (Plff's. Ex. 30.)

These two letters were dictated by Pope and signed by Lyons at a time immediately following the inception of the transactions involved when the parties had clearly in mind the details of the agreement made and long before any dispute or controversy arose either over the subject matter of the agreement or regarding what drafts were deposited under the acceptance agreement. In fact at this time the relations between the parties were extremely cordial and friendly.

With these two letters before us, regardless of all other testimony upon the subject, the argument constructed by appellant upon the Lyons' letter of October 7th disintegrates.

That Deft's. Ex. A is not susceptible to the interpretation given it by appellant is also shown by the witness Pope, who on cross-examination testified:

> "With reservations, I should say that plaintiff's Exhibits 22 and 23 are the letters of transmittal and the shipping documents referred to in the letter of October 7th, which has just been marked Defendant's Exhibit 'A', my reservations being that due to our understanding with Mr. Gilstrap and our conversation, the documents that we had to refer to with respect to the issuance of the $115,000.00 worth of bank acceptances were the sight drafts. * * * It was my understanding that the payment of $115,000.00 was to be made against drafts." (R. 317.)

Comparison of records kept by parties to the transaction.

Criticism is made by appellant of the records kept in the Richfield office respecting the foreign collections deposited with Wells Fargo Bank as not definitely showing what drafts were, and what were not under the acceptance agreement. No foundation whatever exists for such criticism. Pope kept in his office a detailed record of all drafts. (R. 249.) He also kept records showing what particular drafts, according to his understanding of the agreement were under the acceptances, consisting of little pencil memos. (R. 305.) He also used the correspondence with the bank for the purpose of indicating when the drafts were collected and the amount of their proceeds. (R. 305.) Why any additional records should have been kept by him is not explained. In its brief appellant states that

> "there was no evidence introduced as to where, or how or when these 'little pencil memorandums' were kept, nor were they produced at the trial." (Appellant's Br. p. 61.)

We cannot help but manifest some surprise at this latter statement. Appellant's counsel were not prevented from interrogating the witness respecting this subject matter and, unless appellant's counsel were apprehensive lest such cross-examination would have been prejudicial, the inquiry would have been pursued. Furthermore, the records were not demanded. If they had been, they would have been made available to counsel. The inference arising from the absence of any such demand is that appellant's counsel either assumed or knew that they would have been produced, and that their production would be fatal to appellant's claim.

ARGUMENT.

This subdivision of our brief will be confined to a statement of the propositions upon which appellee relies for an affirmance of the judgment of the court below, together with a citation of the statutory provisions and judicial precedents supporting his position.

ORDER OF PRESENTATION.

While in our sequential and chronological presentation of the facts we dealt with the agreement entered into between Richfield Company and appellant in which it was understood

> "that the collection of the foreign drafts by appellant should be entirely separate and apart from all financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between appellant and appellee" (Finding 7, R. 184),

in presenting this argument before touching said agreement we intend to address ourselves to the agreement of January 16, 1930 (Finding 19, R. 190-1), because in our judgment this court can quickly conclude that the finding of the lower court with respect to this latter agreement is not only sustained by the evidence, but the existence of the agreement demonstrated, and it will therefore become unnecessary to give consideration to the evidence establishing the prior agreement which occupies a very substantial portion of the record.

OPINION OF LOWER COURT.

At this point we believe it proper to state that in determining this controversy an opinion was filed by Hon. Frank H. Norcross, judge by whom this action was tried, in which the evidence which forms the basis of his conclusions is succinctly and clearly stated. This opinion is contained in the record (R. 156-180) and itself conclusively establishes not only that the court's findings are supported by the evidence but that upon a consideration of the whole evidence no other determination would have been justified.

I.

IT WAS DEFINITELY AGREED BETWEEN THE RICHFIELD COMPANY AND APPELLANT THAT ONLY THE SO-CALLED SHORT-TERM DRAFTS SHOULD BE DEPOSITED AS SECURITY UNDER THE ACCEPTANCE AGREEMENTS AND THAT THE REMAINING DRAFTS SHOULD BE DEPOSITED FOR COLLECTION ONLY.

Appellee's claim that it was agreed between appellant and Richfield Company that only drafts having their maturity and the proceeds of which would be received in San Francisco not later than one day in advance of the maturity of the acceptances would be eligible or received for deposit under the acceptance agreements, and that it was further agreed that none of the Birla Bros. drafts having a maturity of 180 days, nor other drafts, unless meeting the requirements just specified, could be eligible for or received as security under any acceptance agreement, but that these last mentioned drafts would be deposited with appellant solely for the purpose of collection, is comprehensibly given consideration in our statement of facts and needs no reiteration.

At the very threshold of this discussion we invite the court's attention to a proposition which effectively disposes of appellant's contention that all foreign drafts were under the acceptances. It is admitted by both parties that regardless of the other details of the arrangement it was definitely agreed that all acceptances issued should mature in ninety days. It is likewise conceded that the acceptances would have to be paid at maturity and that the moneys would have to be available for this purpose no longer than one day prior to the date of such maturity.

The issuance and release of bank acceptances is part of the routine business of a commercial bank. Upon each of these transactions it charges a commission. It invites business of this character, provided, of course, it is assured that the money to become due upon the acceptances at their maturity will be forthcoming. It is therefore obvious that if the Richfield Company had secured appellant to the extent of the money becoming due upon the acceptances no reluctance would have existed on the part of the bank to execute and release the acceptances required. It is equally obvious that drafts not payable either on or in advance of the maturity dates of the acceptances would not be acceptable to appellant as security upon which to issue its bank acceptances.

It will be recalled by the court that during the August visit of Hall the financial stability of the foreign customers of Richfield was discussed. (R. 340-1.) Later a list of these foreign creditors was submitted to the bank for consideration and investigation. (R. 345.) Appellant undoubtedly satisfied itself that all of these customers were financially responsible except Birla Bros. Ltd. as to which certain adverse information was received from its correspondent in Calcutta. (R. 346.) As to the latter, however, no objection could be urged against sight drafts drawn by it *for the reason that such sight drafts had to be paid in full before the documents representing the shipment would be delivered.* (R. 401.) Regardless of the agreement, therefore, it must be apparent that if the Richfield Company had agreed to deliver to appellant sufficient sight drafts drawn upon Birla Bros. Ltd. and

other drafts drawn upon its other foreign customers payable prior to the maturity of the acceptances to be issued by it, such drafts would have been accepted by the bank as ample security for the obligation assumed by it in executing and releasing such acceptances. On the other hand, no believable reason could exist for the delivery to appellant of drafts having a maturity long after the due date of the acceptances—in some instances many months thereafter—to satisfy appellant that the acceptances would be paid when due.

Particularly considering the then financial condition of Richfield Company and its constant need of funds, unless therefore the agreement between the parties provided for a continuing or revolving credit, it is incredible that appellant required or Richfield Company agreed to deposit with it any of these long term drafts other than for purposes of collection. Having demonstrated, as we believe we have, that there was no agreement for any such continuing or revolving credit (supra) it necessarily follows that it is unreasonable to assume that the understanding claimed by appellant that *all* collections, regardless of the maturity of the drafts, were agreed to be deposited as security for the acceptance agreements. However, aside from the probabilities of the case that no such agreement was either made or intended to be made is definitely and conclusively established by the evidence to which reference has already been made.

II.

REGARDLESS OF THE DETERMINATION OF ANY OTHER PROPOSITION, THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT NONE OF THE 180-DAY BIRLA BROS. DRAFTS WAS UNDER EITHER OF THE ACCEPTANCE AGREEMENTS, BUT ON THE CONTRARY WERE DEPOSITED SOLELY FOR COLLECTION.

Without further elaborating upon this point, which has already been given ample consideration in the preceding pages of this brief, we are making the point so as to call it to the specific attention of the court and are contenting ourselves with the statement here that a consideration of all of the evidence must impel the court to the conclusion that, regardless of any other issue involved in this controversy, it has been convincingly proven that it was never understood or agreed that the 180-day sight drafts accepted by Birla Bros. Ltd. should be deemed to be under the acceptance agreements, but, on the contrary, that so far as these drafts were concerned, none of which could by any possibility have become payable until long after the acceptances had matured, they were deposited exclusively for the purpose of collection.

III.

THE ACCEPTANCE AGREEMENTS BEING SILENT RESPECTING THE SECURITIES TO WHICH THEY RELATE, PAROL EVIDENCE WAS ADMISSIBLE FOR THE PURPOSE OF IDENTIFYING SUCH SECURITIES AND ALSO TO ESTABLISH THE AGREEMENT RELATING TO THE REMAINING DRAFTS.

A cursory examination of the two agreements introduced in evidence (Plff's. Exs. 16 and 38) will show that none of the drafts intended to be deposited under either agreement as security for the liquidation of the acceptances to be thereafter issued by appellant were described or identified in any manner. Imputing legal stability to these agreements, notwithstanding such silence, it must be apparent that parol evidence was admissible for the purpose of identifying the securities to which the agreement related and upon which its provisions would become fastened. This must necessarily be so because in the absence of such parol evidence the agreements themselves would be entirely innocuous and of no materiality in this controversy. While in the court below this legal proposition was disputed, or at least not conceded, appellant here admits that the rule is as stated because in its brief it is stated (p. 109):

> "They (referring to authorities) were cited by the court in support of its conclusion that since the acceptance agreement is blank as to the drafts deposited thereunder, parol evidence was admissible to prove which drafts were and which were not so deposited. *There can be no question about the correctness of this ruling.*"

It is contended, however, by appellant that if this court determines that ALL drafts were deposited under the acceptance agreements, then the testimony of Hall and Pope respecting the oral agreement waiving the contractual lien provided for in the acceptance agreements would be inadmissible as being in conflict with the provisions of such acceptance agreements. (Appellant's Br. pp. 109-10.)

We have no hesitation in conceding that if *all* of the drafts were proven to be under the acceptance agreements, the conclusion stated by appellant would follow. However, such concession is unnecessary because, as already pointed out, the lower court found on credible evidence that only the so-called short term drafts were deposited under the acceptance agreements and that *none* of the drafts, the proceeds of which are here involved, were so deposited or were deposited for any purpose other than for collection. While this finding of the lower court is attacked upon the ground that it is against the weight of the evidence, it is submitted by appellee that this court is not concerned upon this appeal with the weight of the evidence, and that if it determines that there is *sufficient evidence* in the record to sustain the finding criticized, it must be upheld. Appellee contends, however, that not only is the evidence sufficient to sustain this finding, but furthermore, that it is supported by the great weight as well as the preponderance of the evidence.

In connection with this subject-matter, however, it is contended by appellant that the finding of the lower court to the effect that the drafts NOT under

the acceptance agreements and their proceeds should be kept separate and apart from all other transactions between Richfield and the bank is not supported by the evidence because the agreement testified to by Hall and Pope related to all drafts. (Applt's Br. p. 82.) That this contention is untenable is readily apparent. The agreement between appellant and Richfield was negotiated in August, 1930, prior to the execution or delivery of any acceptance agreement. It was again confirmed and approved on October 6, 1930, upon the return to San Francisco of Hall and Pope, when the first acceptance agreement was delivered. The only reason why the drafts placed under the acceptance agreements are not affected by the oral agreement entered into between Richfield Company and appellant is because of the provisions of the written acceptance agreement in which it is provided that all securities placed under such agreement likewise stand as security for all other indebtedness due the bank. It is conceded that all of the drafts were primarily deposited with appellant for collection, although certain of these drafts, to-wit, the so-called short term drafts, were found by the court to be likewise deposited as security under the acceptance agreements. If none of the drafts had been deposited under the acceptance agreements ALL, as well as their proceeds, would have been covered by the special oral agreement depriving appellant of its banker's lien and right of setoff. When, however, Richfield placed certain of these drafts under the acceptance agreement, such drafts were thereby deprived of the benefit of such oral agreement because of the provision found in

the acceptance agreement to which reference is above made. The mere circumstance, however, that Richfield, by its action in placing the so-called short term drafts under the acceptance agreements prevented the oral agreement from longer attaching to such short term drafts in no way removed the remaining drafts not so deposited from the purview of such oral agreement. The only reason why the previously entered into oral agreement could not be established as to the so-called short term drafts placed under the written acceptance agreements was because the terms of such acceptance agreements could not be varied by parol. Such objection, however, could not and did not apply to the remaining drafts not so deposited.

That the lower court gave recognition to the situation just narrated is clearly made manifest by its findings. It was generally found by the court that

> "during the month of August, 1930, an oral agreement was entered into between said Richfield Oil Company of California and said defendant bank whereby said Richfield Oil Company of California agreed to deposit with said bank for collection only, drafts drawn by said Richfield Oil Company of California on certain of its customers residing in foreign countries. * * * It was then and there further orally agreed by and between said Richfield Oil Company of California and said bank that the collection of said foreign drafts by said bank should be entirely separate and apart from all other financial obligations and transactions theretofore or thereafter to be conducted in the ordinary course of business between said parties." (Finding VIII, R. 183, 4.)

It was further specifically found by said court that "excepting as to draft No. 103102 hereinabove in Finding XV hereof referred to (not involved in this appeal) only those foreign drafts drawn by Richfield Oil Company of California the proceeds of which could be and actually were received by said defendant bank at San Francisco at least one day before the maturity date of the acceptances secured thereby were the subject-matter of the acceptance agreement dated October 4, 1930, and the supplemental acceptance agreement dated November 28, 1930. All other foreign drafts drawn by Richfield Oil Company of California, including those set forth in Finding VIII hereof (those involved in this appeal) were deposited with defendant bank by said Richfield Oil Company of California for collection only and form the subject-matter of the oral agreement made and entered into between said parties during the month of August, 1930." (Finding XVII, R. 189-90.)

It will thus be observed that while the lower court, in accord with the evidence, determined that the agreement contended for by appellee was entered into during August 1930, before either acceptance agreement was executed or delivered, it further determined that (as a result of the execution and delivery of said acceptance agreements) the oral agreement relied on by appellee covered and attached to only the drafts not deposited as security under said acceptance agreements. Not only is there no inconsistency in the situation here described, but on the contrary, it is strictly in accord with the understanding of the parties as reflected by the evidence.

IV.

THE PARAMOUNT PURPOSE SOUGHT TO BE ACCOMPLISHED BY THE APPOINTMENT OF A RECEIVER WAS THE CONTINUANCE OF THE BUSINESS OF THE RICHFIELD OIL COMPANY.

What the bank creditors of Richfield were attempting to accomplish by the appointment of a receiver was primarily to permit its business to continue as formerly and without interruption and thereby to prevent a sacrifice of its properties, it being remembered that if such procedure were pursued there was at least a possibility that the indebtedness due the creditor banks would in whole or in part be ultimately paid. The only alternative was bankruptcy.

This paramount purpose is shown by the pleadings in the receivership proceedings, both primary and ancillary. It is also shown by the order made in each receivership proceeding appointing appellee receiver of Richfield Oil Company, its properties and business. It was conclusively proven by the testimony of Mr. McDuffie, the receiver, as well as by the evidence of Mr. Nolan, one of the chief executive officers of the Bank of America, the principal bank creditor of Richfield Company. No necessity exists to reiterate here any testimony upon this subject because it is specifically mentioned in our "Statement of Facts" and no evidence in opposition was introduced.

V.

THE PURPOSE SOUGHT TO BE ACCOMPLISHED BY THE AGREEMENT EVIDENCED BY RECEIVER'S TELEGRAM OF JANUARY 16, 1931 (Plf's. Ex. 2) AND APPELLANT'S RESPONSE OF JANUARY 16, 1931 (Plf's. Ex. 3) AND THE ACQUIESCENCE THEREIN OF THE OTHER BANK CREDITORS WAS TO ENABLE THE RECEIVER TO CONTINUE THE BUSINESS WITHOUT INTERRUPTION.

We have already pointed out the paramount purpose of the appointment of the receiver of Richfield Company and its properties and business. Such proceedings would have been futile if, after his appointment and qualification, he had been deprived of the assets, credits and funds, the possession of *all* of which was essential to the continuance of the corporation's business and the protection of its properties.

The bank creditors of the Richfield Company, as has already been shown, were not only thoroughly familiar with its financial condition as well as its necessities, but likewise knew that the inability of the receiver to carry on the business of the corporation would immediately result in bankruptcy. Almost immediately following his appointment he learned that certain of these bank creditors had offset cash balances belonging to Richfield in their possession as against the indebtedness due to them. He quickly realized that unless such cash balances were restored and all other bank creditors would agree to refrain from taking such action, *and unless there would be placed at his disposal all of the assets, credits and balances* of Richfield Company, it would be useless for him to attempt to carry out or accomplish the

very purpose for which he was appointed. Avoiding any possible delay, a meeting was called, which was attended by representatives of all bank creditors excepting appellant and a Seattle bank. To them he outlined the situation and made known in no uncertain language that unless he had complete control of the company's property, and there would be turned over to him all of its *assets, credits* and *cash balances,* he would forthwith retire and permit the company to go into bankruptcy. It was to avoid this result that the agreement among the bankers and between them and the receiver was negotiated. At the conclusion of this meeting, a telegram was sent to all of the banks, including appellant, which was prefaced

> "as receiver I am ordered by federal court to take over *all assets including cash in bank* Stop While you have undoubtedly right of offset such right if exercised will seriously cripple receivers operations"

and concluded

> "local banks have indicated they will acquiesce in this program."

In order that appellant should be apprised of the exact situation with which the receiver was confronted, as well as what would follow a lack of full cooperation on the part of the bank creditors, at the request of the receiver there was transmitted to the appellant by telephone the substance of the statements made during the course of the meeting. The preceding day, appellant had already offset Richfield's cash balances towards the indebtedness owing it by the

company. On the same day there had been transmitted to it by the receiver a copy of the order appointing him such receiver, wherein he was authorized and directed to take into his exclusive possession all of the business, property and assets of the company. Likewise there had been transmitted to appellant receiver's telegram of January 16, 1931. (Plff's. Ex. 2.) At this time appellant was thoroughly familiar with the embarrassed financial condition of Richfield Company and undoubtedly realized that in order for the receiver to continue the conduct of the company's business it would be necessary for him to have available all funds and *credits* which in the ordinary course of business would come into his possession. With these matters in mind, defendant replied by wire to receiver's telegram of January 16, 1931, stating that providing all other banks were willing to do so, it would restore to the receiver's account the cash balances offset by it on the preceding day, but that it was holding *"certain"* collections as security for acceptances and *"continued"* to reserve its right of banker's lien against *"those"* collections.

That in construing and interpreting an agreement the object intended to be attained is of paramount importance is the well-settled law of California. Upon this subject in the recent case of

> *In re City and County of San Francisco,* 191 Cal. 172, at page 177,

Mr. Justice Sewell, speaking for the court, said:

> "The object to be attained is, of course, the principal factor of consideration in the construction of contracts."

Keeping in view the conceded purpose of the receivership, as well as the surrounding facts and circumstances, appellee contended upon the trial, as he does here, that by appellant's telegram of January 16, 1931, which was prepared and transmitted to the receiver after appellant had received the receiver's wire (Plff's. Ex. 2), and after it had been advised respecting the subject matter of the conferences between the receiver and the bank creditors, appellant intended to waive any banker's lien or right of setoff that it then possessed respecting the drafts in its possession and their proceeds excepting as to the drafts deposited under the acceptance agreements.

While in our judgment, reading the telegram of appellant (Plff's. Ex. 3) with the telegram to which it responds (Plff's. Ex. 2), and in the light of the surrounding circumstances, no other possible construction can be given to Plaintiff's Exhibit 3, if recourse is had to the familiar rules governing the interpretation of contracts, as enunciated by tribunals of last resort as well as by legislative enactments, any doubt upon this subject must be dispelled. To some of these principles we will now briefly direct the court's attention.

VI.

WHERE A LATENT AMBIGUITY EXISTS IN AN INSTRUMENT OR IT IS SUSCEPTIBLE OF TWO OR MORE CONSTRUCTIONS WITHOUT DOING VIOLENCE TO ANY OF THE SETTLED RULES OF CONSTRUCTION, THE CIRCUMSTANCES UNDER WHICH THE AGREEMENT WAS MADE AND THE CONVERSATIONS BETWEEN THE PARTIES AT THE TIME OF THE NEGOTIATIONS RESULTING IN THE MAKING OF THE AGREEMENT ARE ADMISSIBLE EVIDENCE.

Sec. 1860, *C. C. P.*, provides:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Sec. 1657, *C. C.*, provides:

> "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

In

Balfour v. Fresno Canal etc. Co., 109 Cal. 221, which is the leading case in California, Van Fleet, Judge, held:

> "Where the language of a contract is fairly susceptible of one or two interpretations without doing violence to its usual and ordinary import, or some established rule of construction, an ambiguity arises for the explanation of which extrinsic evidence may be resorted to.
>
> For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove

that they intended and understood the language in the sense contended for; and for that purpose the conversations between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. (Citing cases.)"

In

Gilde v. Shuster, 83 Cal. App. 537,

it was declared:

"It is the duty of a court, when the language of a written contract is not clear, positive and certain, to consult the conditions, situation and the motives of the respective parties for the purpose of ascertaining their intention. * * * Where there is a latent ambiguity in a written contract, and the language will admit of more than one interpretation, or if the intention of the parties is doubtful from a reading of the document, parol evidence of the circumstances and situation of the parties may be considered to ascertain their true intention, and in this matter an issue of fact may be presented."

A recent case decided by the Court of Appeals of this Circuit in which the question under discussion was involved is

Modoc Co. Bank v. Ringling, 7 Fed. (2d) 535,

where it is said (p. 540):

"It is a fundamental rule that in the construction of contract the courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties

possessed when the contract was made." (Citing a number of federal decisions, among others, decisions of the United States Supreme Court.)

That in considering defendant's wire of January 16, 1931 (Plff's. Ex. 3), resort should be had to extrinsic evidence is made manifest by the decision of Mr. Justice Sanborn, subsequently a justice of the Supreme Court of the United States, in

Pressed Steel Car Co. v. Eastern R. Co., 121 Fed. 609 (C. C. A. 8th Cir.),

where he said:

"To the counsel of each of these parties this contract seems plain and unambiguous and its meaning certain, and *yet it has an entirely different significance to the representatives of each of these corporations.* This fact, repeated perusals and a careful study of the writing present very convincing evidence that its terms are not altogether clear, that they were well calculated to raise this controversy that they were susceptible of two constructions. It remains to determine which is the more natural, probable and rational interpretation.

There is no evidence in the record that either of the two interpretations urged upon our consideration would not deter either of the parties from entering into the agreement. What they intended to stipulate, what they understood the contract to mean, and what they would have done if their interpretation of it had been different can be deduced from the contract itself, the situation of the parties and the circumstances surrounding them when they made it."

See also

Sheely v. Byers, 73 Cal. App. 44;

Weslin v. Lapham, 77 Cal. App. 137;

Los Angeles High School v. Quinn, 195 Cal. 377;

Hind v. Easterly Products Co., 195 Cal. 653.

Further multiplication of these decisions, we deem entirely unnecessary.

VII.

THE INTENTION OF THE PARTIES IN ENTERING INTO AN AGREEMENT, WHEN ASCERTAINED, SHOULD CONTROL ITS INTERPRETATION AND CONSTRUCTION.

In

Regsloff v. Smith, 79 Cal. App. 443, at page 452, it is said:

> "The purpose of construction is to ascertain the intent of the parties. Where the intent of the parties is ascertained *it must always take precedence over the literal sense of terms.*"

We have already pointed out that the undoubted intention of the parties in entering into the agreement between the receiver and the bank creditors of Richfield was to enable the receiver to carry on without interruption the business of the corporation, and by so doing, conserve its property and assets and save its value as a going concern, to the end that bankruptcy would be avoided, and its creditors receive at least a part of the indebtedness due them.

In view of the uncontradicted record as to this phase of the case, there could be no other intention. That such intention, when ascertained by the court, should control its interpretation and construction of the contract being considered is no longer subject to dispute.

Sec. 1636, *Civil Code,* provides:

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting; so far as the same is ascertainable and lawful."

In

Ogburn v. Travelers Ins. Co., 207 Cal. 50,

it is said:

"In the interpretation of a written instrument the primary object is to ascertain and carry out the *intention of the parties* thereto. * * *"

See also

Gilde v. Shuster, 83 Cal. App. 537;
Snyder v. Holt Mfg. Co., 134 Cal. 325;
Turner v. Kearny, 116 Cal. 65;
Shoemaker v. Acker, 116 Cal. 239;
Delano v. Jacoby, 96 Cal. 675;
Stein v. Archibald, 151 Cal. 220.

VIII.

CONTEMPORANEOUS AND PRACTICAL CONSTRUCTION OF AN INSTRUMENT BY THE PARTIES AND THEIR SUBSEQUENT ACTIONS AND CONDUCT AFFORD CONVINCING EVIDENCE AS TO ITS MEANING AND EFFECT, WHERE ITS TERMS ARE AMBIGUOUS OR DOUBTFUL.

In the "Statement of Facts" we commented upon the contemporaneous and subsequent conduct, acts and correspondence of the parties with reference to the agreement evidenced by Plff's. Exs. 2 and 3. We pointed out that between the date of the appointment of the receiver and May 8, 1931, such conduct, acts and correspondence were ALL consistent with the receiver's interpretation of the agreement and inconsistent with the construction now sought to be placed thereon by appellant. Under these circumstances, we do not believe it essential to again review any of these facts because we appreciate that they are well within the memory of the court.

It is submitted that under the law, the construction thus given to the agreement by the parties should be the construction placed upon it by this court.

In

Keith v. Electric Engineering Co., 136 Cal. 184,

the court in giving recognition to the rule here invoked, quoted from a learned English jurist as follows:

> " 'Tell me,' said Lord Chancellor Sugden, 'what you have done under a deed, and I will tell you what the deed means.' "

In

Mayberry v. Alhambra, 125 Cal. 445,

it was held

"that where the provisions of a contract are doubtful, its practical construction by the parties is controlling."

In

Rockwell v. Light, 6 Cal. App. 563-5,

it is said:

"When the meaning of the language of a contract is considered doubtful, the acts of the parties done under it afford one of the most reliable clues to the intention of the parties."

The federal decisions upon this subject are equally conclusive upon this subject.

In

Christenson v. Gorton-Pew Fisheries Co., 8 Fed. (2d) 689 (C. C. A.),

it is said:

"The terms being indefinite and somewhat uncertain, the construction placed upon them as indicated by the writings of the parties and their conduct is always *controlling and binding* upon them. (Citing cases.)

The courts never construe a contract ambiguous in its terms contrary to the construction the parties themselves have placed upon it. The parties have by their writings committed themselves to a practical construction, the function to construe the contract under such circumstances is for the court."

In

Sternberg v. Drainage District, 44 Fed. (2d) 560 (C. C. A.),

the rule is thus stated:

> "The practical construction given to this contract by the parties as indicated by all the facts and surrounding circumstances is entitled to great, if not controlling, weight in determining its proper interpretation."

In

Vital v. Kerr, 297 Fed. 959,

it is said:

> "But where the meaning of a contract is not clearly apparent upon its face, but is more or less ambiguous, the interpretation given to the contract by the parties themselves, as shown by their acts, will be adopted by the court, and to this end not only the acts, but the declarations of the parties may be considered. (Citing cases.)"

Without quoting from the decisions, we call the court's attention to

San Francisco I. & M. Co. v. Sweet Steel Co., 23 Fed. (2d) 783 (C. C. A. Cal);

Cutting v. Bryan, 30 Fed. (2d) 754 (C. C. A. Cal.);

Indian Territory v. Bartlesville Zinc Co., 288 Fed. 273 (C. C. A.);

Federal Surety Co. v. Bentley & Sons Co., 51 Fed. (2d) 24 (C. C. A.);

Harris v. Morse, 54 Fed. (2d) 109.

IX.

THE COURT SHOULD CONSTRUE THE TELEGRAM OF JANUARY 16, 1931, IN THE SENSE IN WHICH APPELLANT BELIEVED IT WAS UNDERSTOOD BY THE RECEIVER AND OTHER BANK CREDITORS OF RICHFIELD COMPANY.

Viewed in the light of the evidence introduced during the trial, no doubt can possibly exist with respect to the receiver's understanding of appellant's telegram of January 16, 1931. (Plff's. Ex. 3.) The same situation exists with respect to the bank creditors, to whose attention it was called by the receiver. That both the receiver and these bank creditors understood that by its telegram appellant intended to and did waive its banker's lien and right of setoff as against all assets, credits and balances, including cash balances in its possession, excepting as to CERTAIN drafts and their proceeds then held by it as security for its acceptances, and that as to all other drafts and their proceeds, such banker's lien and right of setoff were waived, is conclusively disclosed by the undisputed testimony. Every act of the receiver, as well as every letter written or word spoken by him from the date of its receipt until and including the trial of this case eloquently bespeak his implicit belief that such was the intention of appellant. The action of the Security First National Bank in crediting to the account of the receiver the proceeds of the various drafts in its possession at the time of the appointment of the receiver demonstrates its belief. The protests of the creditor bankers upon learning of the action of appellant is seizing the funds, the title to which is here in dispute, points to their belief.

Proof alone of the background to Plff's. Ex. 3, and the purpose sought to be achieved by the demand of the receiver would itself be sufficient to establish that appellant believed that the receiver and the creditor banks understood the telegram in accord with the meaning imputed to it by them. If, however, there ever was any doubt upon this subject, it is only necessary to direct the court's attention to the correspondence passing between the receiver and appellant when it undertook to retain the $7749.58, being net proceeds of certain drafts remaining in its possession after the payment in full of *all* acceptances issued by it. *The sole basis of the receiver's demand for payment to him of these proceeds was appellant's telegram to the receiver.* (Plff's. Ex. 3.) This correspondence not only proves the sense in which the receiver understood Plff's. Ex. 3 and knowledge of such understanding on the part of appellant, but the subsequent action of the bank in forthwith crediting to the account of receiver the net proceeds of these drafts likewise proves that the bank itself interpreted and construed its telegram in accord with the construction placed upon it by the receiver. That such interpretation should be given Plff's. Ex. 3 by this court is clear.

Sec. 1649, *Civil Code,* provides:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it, that the promisee understood it."

Sec. 1864, *Code of Civil Procedure,* provides:

"When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be done which is most favorable to the party in whose favor the provision was made."

Farren v. Willard, 76 Cal. App. 460, 466;

El Dara Oil Co. v. Gibson, 201 Cal. 231, 236;

McClintick v. Leonards, 103 Cal. App. 768;

Lang v. Pacific Brewing Co., 44 Cal. App. 618, 621;

Kelly v. Great Western etc. Co., 46 Cal. App. 747, 752.

X.

THE LANGUAGE OF THE TELEGRAM OF JANUARY 16, 1931 (Plff's. Ex. 3), SHOULD BE INTERPRETED MOST STRONGLY AGAINST THE APPELLANT, BY WHOM IT WAS PREPARED, AND WHO WAS THE PROMISOR THEREUNDER.

Whatever uncertainty or ambiguity appears in the telegram above mentioned, read in connection with the receiver's telegram to appellant (Plff's. Ex. 2) was caused by appellant, by whom it was prepared, and who was the promisor thereunder. Under these circumstances, any ambiguity in the telegram should be interpreted most strongly against it.

Sec. 1654, *Civil Code,* provides:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * *"

In

> *Sternberg v. Drainage Dist. etc.,* 44 Fed. (2d) 560, at page 562,

the court states:

> "It is first to be observed that the instrument forming the basis of this controversy was prepared by the contractors and presented to the commissioners of the defendant. If the contract is ambiguous the plaintiff is responsible for its ambiguity and under such circumstances, the contract should be construed most strongly against the party preparing it. (Phoenix Ins. Co. v. Slaughter, 12 Wall. 404, 20 L. ed. 444; Bijur Motor Lighting Co. v. Eclipse Machine Co. (D.

C.), 237 Fed. 89; Caldwell v. Twin Falls Salmon River Land Co. (D. C.), 225 Fed. 584; Christian v. First Nat. Bank (C. C. A.), 155 Fed. 705; Van Zandt v. Hanover Nat. Bank (C. C. A.), 149 Fed. 127; etc."

In

In re New York Towing & Transportation Corp., 57 Fed. (2d) 337, at page 339,

the court uses the following language:

"It appears that the contract in question was prepared by the Ford Motor Company and accepted by the Towing Corporation. Under these circumstances, if deemed to be ambiguous, it may be my duty to resolve any doubt against the party preparing it. See The Pensacola (C. C. A. 5), 263 Fed. 661; Drainage Dist. No. 1 v. Rude (C. C. A. 8), 21 Fed. (2d) 257."

In

Continental Oil Co. v. Fisher, 55 Fed. (2d) 14, at page 16,

it is said:

"It may be true the intention of the Continental Oil Company was to contract for this period of reassignment. Their tender indicated they had that theory of the 'modification agreement'. But why was the option not mentioned? A capable lawyer for the company drew the contract, and even if we assume the instrument to be ambiguous in this respect, the rule applies that the doubt be resolved against the party who drew it." (Citing many cases.)

In

East & West Ins. Co. etc. v. Fidel., 49 Fed. (2d) 35 (C. C. A.),

the rule is thus stated at page 38:

> "After an ambiguity is established, a contract is construed strictly against the party which drafted it. Graham v. Busines Men's Assurance Co. (C. C. A. 10), 43 Fed. (2d) 673, and cases therein cited."

XI.

THE CONSTRUCTION PLACED BY APPELLANT UPON ITS TELEGRAM (Plff's. Ex. 3), THAT IT CONTINUED TO RESERVE A BANKER'S LIEN UPON ALL COLLECTIONS THERETOFORE DEPOSITED WITH IT BY RICHFIELD FOR THE PURPOSE OF ENFORCING THE LATTER TO PAY A GENERAL INDEBTEDNESS DUE IT, IF ADOPTED, WOULD LEAD TO AN ABSURDITY AND RENDER UNNECESSARY AND MEANINGLESS SPECIFIC LANGUAGE INTENTIONALLY USED BY IT IN ITS TELEGRAM.

To adopt the construction which appellant seeks to have this court place upon its telegram (Plff's. Ex. 3) in its endeavor to retain the proceeds of drafts to which it is not entitled, it will be necessary for the court to exclude from consideration language deliberately inserted in the telegram and will involve an absurdity never intended or contemplated by appellant.

If appellant had merely intended to restore the cash balance belonging to the Richfield Company which it had already offset, it would never have inserted in the telegram the last paragraph placed therein, which is one of the most important portions of the telegram, and one upon which the receiver and the bank creditors relied. It would have merely stated:

> "Replying telegram we are willing to restore into your name as receiver Richfield balance in checking account provided we are notified by you that all company banks have taken similar action."

But appellant realized that the telegram, if confined alone to the statement above quoted, which constitutes the first paragraph in its telegram, would not have

been satisfying either to the receiver or to the other bank creditors. In the preparation of this telegram, it had in mind primarily the purpose sought to be accomplished by the receivership proceedings, to which we have already alluded, viz., the continuance of the business of Richfield Company. It also had in mind not only the preliminary statement contained in the receiver's telegram to it (Plff's. Ex. 2), viz.,

> "As receiver I am ordered by federal court to take over *all assets including cash in banks*",

but as well as the information conveyed to it through Mr. Nolan, one of the framers of the telegram, respecting the subject matter of the conference held that very day between the receiver and the representatives of the creditor banks. While it had in its possession all drafts of Richfield Company for collection, it realized that the other creditor banks did not have in mind the fact that it had advanced to Richfield Company funds through the medium of acceptances, which were secured by some of these foreign drafts placed with it for collection. It undoubtedly believed that it should be reimbursed by Richfield Company for the amount of these advances made by it through acceptances in the same manner that any other bank would be entitled to be reimbursed for advances made by it through the medium of discounting drafts placed with it for collection. With these matters in mind, and believing it only equitable that it should be repaid the amount of these advances from the proceeds of the collections of the drafts securing said acceptances, and further believing it only fair to the other creditor

banks to advise them of that fact, it therefore added the second paragraph of its wire of January 16, 1931, which, paraphrased, was intended by it to mean the following:

> "We have advanced money to Richfield Oil Company through the medium of acceptances, which acceptances are secured by certain only of its collections and we continue to reserve all our rights of security as against these particular collections."

Otherwise appellant intended to deliver to the receiver *"all assets,* including cash in bank". Its specific reservation of *"certain"* only of the collections held by it constituted a waiver as to all other collections in its possession which the bank intended to be available to the receiver. This intent of the bank was clearly evidenced by its subsequent conduct from March 5, 1931, when the acceptances were repaid in full, until May 8, 1931, during all of such time it turned over to the receiver the proceeds of all other collections received by it.

XII.

AN EXPRESS RESERVATION OF A LIEN UPON CERTAIN PROPERTY, OR TO A CERTAIN EXTENT, CONSTITUTES A WAIVER AS TO ALL OTHER PROPERTY OR TO A GREATER EXTENT THAN THAT RESERVED.

In appellant's telegram (Plff's. Ex. 3) the words of reservation are:

> "Please understand that we *continue* to reserve all our rights for banker's lien against *these collections.*"

The collections referred to as expressed in the telegram are

> "We are holding *certain* collections as security for acceptances."

It will be observed that the banker's lien which the appellant intends to "continue to reserve" is its lien against the *"certain"* collections previously referred to. It is obvious that under this reservation it cannot be claimed by appellant that it was reserving any lien as against any of the collections in its possession excepting the *"certain"* collections which at the time of the sending of the telegram it held as security for the acceptances issued by it. In using this language appellant intended to and did waive by implication any lien it then had upon or claimed it then had to any property belonging to Richfield Oil Company within its possession or under its control other than and excepting the collections deposited as security for the acceptances. That such limited reservation constituted a waiver of any lien greater in extent than that re-

served or upon property other than that described or identified has been definitely settled by the United States Supreme Court in

Brown v. Gilman, 14 U. S. 564,

where the court, at page 573, uses the following language:

> "An express contract that the lien shall be retained to a specific extent is equivalent to a waiver of the lien to any greater extent."

See also

Fendall v. Miller, 196 Pac. (Ore.) 381.,

where the court states the rule of law as follows:

> "It is a well settled rule of law that where there is an exception or reservation of one thing, it will be presumed that no other exceptions or reservations are intended than those expressed."

In

Wilson v. Alcatraz Asphalt Co., 142 Cal. 182,

the court held:

> "The contract, and each and every clause thereof, must be read together, so as to arrive at its true intent and meaning, and where the contract recites that, unless for certain excepted causes, plaintiff shall be unable to supply the oil demanded by the contract, plaintiff shall at all times be required to furnish same, the contract excludes all other causes by implication, and the plaintiff must supply the oil required by the contract by the delivery of oil produced by other parties, where such delivery is not stipulated against."

The above principle is also expressed in the Latin maxim:

"Expressio unius est exclusio alterius."

See also

2 *Elliott on Contracts,* Secs. 1532 and 1533,

wherein the above quoted maxim is referred to and commented upon.

In

Crosby v. Patch, 18 Cal. 438,

it is said:

> "The specification of particular sections as repealed is the equivalent to a declaration that the remaining sections shall continue in force."

In

Fay v. District Court of Appeal, 200 Cal. 522,

the rule for which we contend is thus expressed:

> "The application of this principle to the instant problem is attended with another principle of interpretation of almost equal importance, which is that when in any enactment there appears an express modification or repeal of certain provisions in a former enactment, such express modification or repeal of the portions thereof thus affected will be held to disclose the full intent of the framers of the later enactment as to how much or what portion of the former it was intended to modify or repeal. This upon the principle *expressio unius est exclusio alterius;* and in such a case an implied modification or repeal of such portions of the former law as are not expressly referred to as being repealed or modified is to be all the more avoided in determining the intent and effect of the latter enactment."

Moreover the Supreme Court of the United States has recognized this fundamental rule of statutory construction in the case of

Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 929.

Furthermore, the use of the word *"continue"* in Plff's. Ex. 3 is itself significant as bearing upon the interpretation of this wire. In this connection the evidence shows that prior to the date of the appointment of the receiver, none of the proceeds of any of the drafts which up to that date had been collected by appellant had been credited in payment of the general indebtedness of the Richfield Company. All of these proceeds were either deposited in anticipation of meeting acceptances or applied in payment of the acceptances released on October 8, 1930, totaling $115,000 or credited to the account of the Richfield Company. It will thus be seen that, judging from the conduct of appellant between the date upon which the first drafts were deposited, viz.: October 8, 1930, and the date of the appointment of the receiver, all proceeds of drafts not reserved for use or used in meeting acceptances were returned and credited to Richfield Company. In terpreting the word *"continue"* in the telegram of appellant (Plff's. Ex. 3) in the light of its conduct of appellant, no difficulty should be experienced in construing the character and extent of the lien reserved by the appellant to a lien only upon the drafts deposited under the acceptance agreements.

XIII.

APPELLANT'S TELEGRAM DATED JANUARY 16, 1931 (Plff's. Ex. 3), RECOGNIZES THAT ONLY A CERTAIN PORTION OF THE DRAFTS DEPOSITED FOR COLLECTION WERE "HELD AS SECURITY FOR ACCEPTANCES", AND THAT ONLY AS TO SUCH DRAFTS DID IT CONTINUE TO RESERVE ITS ALLEGED BANKER'S LIEN.

With respect to the subject under consideration, appellant's telegram (Plff's. Ex. 3) reads as follows:

> "We are holding 'certain' collections as security for acceptances. Please understand that we *continue* to reserve all our rights for banker's lien *against these collections.*"

Preliminarily, it may be observed that if this court holds that the evidence is sufficient to sustain the finding of the lower court that only *"certain"* and not all of the foreign drafts were deposited under the acceptance agreements, it necessarily follows that regardless of what construction is placed upon Plff's. Ex. 3, the reservation by appellant of its banker's lien applies only to such specified drafts. It would have no application whatever to the remaining drafts deposited solely for collection.

Upon the evidence already called to the court's attention, it must be apparent that when appellant in its telegram (Plff's. Ex. 3) used the word *"certain"* in referring to the collections held by it as security for acceptances, and as to which it was reserving a banker's lien, it intended *ex industria* to use, as it did, a word of limitation and qualification, and thereby intended to and did refer exclusively but to those collections which it then had in its possession deposited under the acceptance agreements.

That the word *"certain"* under the circumstances here proven, and in the sense in which appellant used the word, and in which the appellee and the creditor banks understood such use is a word of limitation, and that it should be given such interpretation is indisputable.

In

Webster's New International Dictionary

"certain" is defined to be

> "one or some among possible others; one or some known only as of a specified name or character."

See also

Braden v. Mitchell, 59 Cal. App. 59;
State v. Burdick, 15 R. I. 239, 2 Atl. 764.

But even though the word *"certain"* has a dual meaning, depending upon the purpose of its use, its interpretation and meaning, taking into consideration the surrounding circumstances, is a question of fact for the trial court, by which an appellate court is bound.

XIV.

THE AGREEMENT BETWEEN HALL AND THE OFFICIALS OF APPELLANT THAT THE DRAFTS AND THEIR PROCEEDS HEREIN INVOLVED SHOULD BE DEEMED TO BE SEPARATE AND APART FROM OTHER BUSINESS OF RICHFIELD WITH, AND ITS FINANCIAL OBLIGATIONS TO APPELLANT, CONSTITUTED SUCH DRAFTS AND PROCEEDS A SPECIAL FUND AND DEPOSIT AS AGAINST WHICH NO BANKER'S LIEN OR RIGHT OF SET-OFF EXISTED.

We are firmly convinced that in the preceding pages of this brief we have established the existence of the agreement testified to by Hall and Pope, and confirmed by Lipman, the latter being the President and chief executive of appellant. In this connection we also pointed out that at the time of the agreement an unsecured indebtedness was owed by Richfield Company to appellant in the sum of $625,000, and considering the necessities of the Richfield Company, it would have been extremely improbable that the latter's officials would deliberately entrust to the appellant for collection a large number of drafts, knowing that at any instant thereafter appellant could exercise its banker's lien or right of set-off and prevent the Richfield Company from obtaining possession of funds constantly required to permit its continuance in business. That such agreement, if established, converted the collections, excepting those deposited under the acceptance agreements, into a special fund or deposit upon which appellant could not exercise a banker's lien or right of set-off, has been frequently determined not only by the courts of this and other states, but likewise by Federal tribunals. In referring to the

law applicable to the point under consideration, for the convenience of the court we will classify the authorities under separate sub-titles.

A. Where securities are in a bank's hands under circumstances indicating a particular mode of dealing inconsistent with the bank's general lien, the bank has no lien thereon, and such lien cannot be exercised because the deposits were not made in the ordinary course of business.

In

7 *Corpus Juris,* Sec. 358, page 660,

the rule is thus stated:

> "Deposit for Specific Purpose: The general lien of a bank upon a customer's deposits will not be recognized where the circumstances are inconsistent therewith and accordingly where moneys or securities are deposited with the bank for a particular purpose as to pay or secure a particular loan or debt, they cannot be retained by the bank for a general balance or for the payment of all other claims. * * *"

In

Reynes v. Dumont, 130 U. S. 355; 32 L. ed. 934,

it was held:

> "A general lien in favor of a bank or banker may be implied from the usage of the business, but it does not arise upon securities accidentally in possession of the bank or not in its possession in the course of its business as such, *nor where the securities are in its hands under circum-*

stances or where there is a particular mode of dealing inconsistent with such general lien."

Further held:

"Bond not lodged in the hands of a banker in the ordinary course of banking business, but for a specific purpose and when that purpose was accomplished, permitted to remain for safekeeping, are not subject to a bank's lien for the ultimate debit balance in favor of the bank or against the parties who placed them there."

Chief Justice Fuller, in his decision, states:

"And applying the principles upon which such a lien rests, it is doubtful whether it ever existed in favor of Schuchardt & Sons. Undoubtedly, while a 'general lien for a balance of accounts is founded on custom, and is not favored, and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it,' and 'general liens are looked at with jealousy, because they encroach upon the common law, and disturb the equal distribution of the debtor's estate among his creditors' (2 Kent's Commentaries, *636), yet a general lien does arise in favor of a bank or banker out of contract expressed, or implied from the usage of business, *in the absence of anything to show a contrary intention.* It does not arise upon securities accidentally in the possession of the bank, *or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien."* (Citing cases.)

In

Hanover Nat. Bank etc. v. Suddath, 215 U. S. 110; 54 L. ed. 115,

at page 118 (L. Ed.) it is said:

"The subject was elaborately considered and the authorities were fully reviewed in Reynes v. Dumont, 130 U. S. 354; 32 L. Ed. 934. In that case securities had been sent to bankers for a specific purpose. The purpose having been accomplished the securities were permitted to remain in custody of the bankers as depositaries because they were in a good market and a place convenient for procuring loans and because the expressage upon their return would have been great. The right to a general banker's lien upon the securities was denied. Such a lien it was said would arise 'in favor of a bank or banker out of contract, express or implied, from the usage of the business *in the absence of anything to show a contrary intention.*' Ordinarily it was declared the lien would attach in favor of a bank upon securities and money of the customer deposited in the usual course of business, etc. It was, however, expressly declared not to 'arise upon securities accidentally in the possession of the bank *or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances or where there is a particular mode of dealing inconsistent with such general lien.*' "

In

Ballow v. Farmers Bank etc., 45 S. W. (2d) 882,

it is said:

"There is no doubt about the general rule that when a depositor is indebted to a bank, and the debts are mutual, that is, between the same parties and in the same right, the bank may apply the deposit to the payment of the debt due it by the depositor. However, this rule is subject to the exception that set-off will not be allowed where its natural consequence will be to give the bank a preferential advantage over other creditors, or where it is contrary to the agreement under which the deposit was made, *or where the bank has dealt with the depositor under circumstances inconsistent with the exercise of the right of set-off and having the effect of estopping it from asserting or maintaining the right.*"

Citing,

Union Bank & Trust Co. v. Loble (C. C. A.), 20 F. (2d) 124;

Union Trust Co. v. Peck (C. C. A.), 16 F. (2d) 986;

Merrimack Nat. Bank v. Bailey (C. C. A.), 289 F. 468;

Farmers & Merchants State Bank v. Park (C. C. A.), 209 F. 613;

In re Gans & Klein (D. C.), 14 F. (2d) 116;

In re Cross (D. C.), 119 F. 950;

A leading case upon this subject, decided by the Circuit Court of Appeals of this Circuit, is the case of

Union Bank v. Loble, 20 F. (2d) 124 (C. C. A. 9),

where Judge Gilbert, in confirming the judgment of the court below, said:

"But a bank may so deal with a depositor as to waive or be estopped to assert the right of set-off. Michie, Banks & Banking, 1027. *But the right does not exist where the circumstances are inconsistent with its exercise.* (Citing cases.) *Nor where the principles of legal or equitable set-off do not authorize it.* (Citing cases.)

"While the money realized on the special sale and deposited to the bankrupt's current account and subject to his check for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of set-off *we are inclined to the view that the circumstances under which the fund was created and the cooperation of the bank and the bankrupt in its creation were sufficient to so far impress upon it the character of trust fund that the bank should be held estopped to assert a lien thereon or to the right of set-off.*" Certiorari denied. 72 L. Ed.

B. The understanding between Hall and the officials of the bank, under which the drafts were deposited, gave to such drafts a special or trust character thereby cutting off the right of set-off or right to exercise a banker's lien.

In

Union Trust Co. v. Peck, 16 Fed. (2d) 986,

the principle here invoked is upheld in the following language:

"We are also in agreement with him that the trustee is entitled to recover from the bank the three sums of $5,000, $7,500 and $2,001.02, re-

spectively, subsequently taken from the bankrupt's deposits by the bank. His reasoning on the subject seems to us to be sound. It is, moreover, to be noted that, before and at the time the bank applied these amounts to its own use, it, **the bankrupt and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern** by securing the general acceptance of a scheme of reorganzation which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank, which both it and the bankrupt intended should be used for the reduction of the former's debt, were obviously **not made in ordinary course, in any fair sense of that phrase.** Most men would feel that **it is an implied term of such negotiations that during their pendency nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began,** or upon which it did not then have a prior lien. It follows that so much of the decree below as is challenged by the bank was right, and must be affirmed."

See also:

Union Bank & Trust Co. v. Loble, 20 Fed. (2d) 124,

cited under subdivision (A) hereof.

The decision of the District Court which was affirmed in the case last above cited, is entitled

In re Gans & Klein, 14 Fed. (2d) 116.

In rendering his decision, Judge Bourquin, at page 117, said:

"And the law is well settled (the general law of deposits and trusts) that the trustee, having custody of the deposit, has no right of set-off against the fund, by reason of the depositor's debt to the depository, which can be exercised to the prejudice of the beneficiaries or any one in their right. (Citing cases.) (3) Moreover, the law is equally settled that he who secures possession of property or money, upon his agreement to make certain disposition or application of it, is obligated to perform accordingly or to return the thing to him from whom possession was received. He cannot repudiate his contract, and, in advantage of his wrong, otherwise dispose of the thing to his own benefit. (Citing cases.) (4) By breach of contract a trust cannot be converted to a debt, the title to special deposits cannot be transferred, and set-off against them cannot be had by the defaulting contractor. Essential confidence, fair dealing, and common honesty in business forbid. Libby v. Hopkins, supra."

In

Farmers' & Merchants' State Bank of Waco, Tex., v. Park, 209 Fed. 613 (C. C. A.),

the court stated the proposition as follows:

"Under the evidence in the case, the deposit made by the Slayden-Kirksey Woolen Mill with the appellant bank shortly prior to the bankruptcy was a *special deposit* agreed not to be subject to general set-off. To allow a set-off of the same against the indebtedness previously due the bank would be to give the bank an advantage not enjoyed by other creditors."

C. **While the bank has the right to appropriate money or property in its possession to the extinguishment of a matured debt, it cannot do so if such fund with the knowledge of the bank is charged with the subservience of a special burden or purpose, or constitutes a trust fund.**

American Surety Co. v. Bank of Italy, 63 Cal. App. 149.

Held:

"A bank has a lien upon and so is vested with the right to appropriate any money or property in its possession belonging to a customer to the extinguishment of any matured indebtedness of such customer to the bank to the full extent of the money or property so possessed, if necessary, and so far as it may go towards such extinguishment, provided, of course, that such property or money so deposited *has not been charged, with the knowledge of the bank, with the subserviance of a special burden or purpose, or does not constitute a trust fund, of which the bank had notice.*"

Further held:

"Such banker's lien ordinarily attaches in favor of the bank upon the securities and funds of a customer *deposited in the usual course of business* for advances supposed to have been made upon their credit, not only against the depositor but against the unknown equities of all others in interest, *unless modified or waived by some agreement, express or implied, or conduct incon-*

sistent with its assertion; but no such lien would prevail against the equity of a beneficial owner of which the bank had notice either actual or constructive."

The judgment in this case was reversed, but in the last paragraph of the decision the following is stated:

"Counsel asked this court, if a reversal of the judgment be ordered, to order the court below to enter judgment upon its findings and the agreed statement of facts for and in favor of the defendant. This, we think, we should not do. *Upon a retrial a different set of facts might be shown* on the question of notice to the bank or of an agreement between the latter and Ernest Green *that the account in question was opened for the use and benefit of a special purpose.*"

In

7 *Corpus Juris,* sec. 358, page 660,

it is stated:

"Deposit for Specific Purpose: The general lien of a bank upon a customer's deposits will not be recognized *where the circumstances are inconsistent therewith* and accordingly where moneys or securities are deposited with the bank for a particular purpose as to pay or secure a particular loan or debt, they cannot be retained by the bank for a general balance or for the payment of all other claims. * * *"

In

7 *Corpus Juris,* sec. 358½, page 660,

it is stated:

"Deposit Affected with Trust: It has been considered that where a deposit is impressed with a trust the bank cannot retain it on the doctrine of equitable set-off."

See

United States v. Butterworth-Judson Corp., 267 U. S. 387; 69 L. Ed. 672.

In re Davis, 119 Fed. 950,

it is said at page 955:

"While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when the deposit is made for a special purpose, *as for example, to be paid to creditors, as was the case here.* In the latter case a fiduciary relationship is created, and the money is held in a trust fund, not as bank assets, and hence, the bank is without lawful right to appropriate it to its own use. (Citing cases.)

In Wilson v. Dawson, 52 Ind. 515, the court stated the principle in the following language: 'It is a general rule that funds deposited in a bank *for a special purpose* known to the bank cannot be withheld from that purpose to the end that they may be set off by the bank against a debt due to it from the depositor. *The claim of a general lien by the bank would be inconsistent with its special undertaking.* (Citing Morse, Banks and Banking, 34 et seq., and authorities cited; Bank v. McAlester, 9 Pa. 475.)"

In

Wagner v. Citizens Bank, 122 S. W. (Tenn.) 245; 28 L. R. A. (New Series) 484,

the court states:

"A bank which, through its president as one of the creditors of a manufacturing company, has agreed with it and the other creditors that the assets of the company shall be collected and deposited in the bank to be divided among all creditors prorata, cannot upon the institution of bankruptcy proceedings against the corporation set off the fund so accumulated against its own claim *since the fund is a trust deposit for specific purposes created with the knowledge and consent of the bank,* and it cannot for the purposes of setoff treat it as the individual property of the corporation."

* * * * * * *

"We are of the opinion that these authorities are applicable in the present instance. It distinctly appears on this record that the funds accumulated in the defendant bank were deposited for a special purpose with the knowledge and consent of the president of the bank; that the funds could not be checked out by the president of the furniture company without the signature of J. L. Morrison, representative of the creditors' committee. *The fund thereby became a trust deposit for specific purposes with the knowledge and consent of the bank and the latter had no right of setoff in said fund against the bankrupt's indebtedness to the bank."*

XV.

THE ACTION OF THE OTHER BANKS IN RESTORING TO THE RECEIVER THE CASH BALANCES AND CREDITS OF THE RICHFIELD COMPANY IN THEIR POSSESSION, AND IN FAILING TO EXERCISE THEIR BANKERS' LIENS IN CONSIDERATION OF THE AGREEMENT OF APPELLANT TO DO LIKEWISE, CREATED AN ESTOPPEL AGAINST APPELLANT EFFECTUALLY PREVENTING IT FROM THEREAFTER EXERCISING ITS BANKER'S LIEN UPON BALANCES AND CREDITS IN ITS POSSESSION AT THE TIME OF SUCH AGREEMENT.

In

Union Bank & Trust Co. v. Loble, 14 Fed. (2d) 116,

the plaintiff, with certain other creditors—prior to insolvency—agreed to refrain from pressing their claims to the end that the business might continue and certain eastern creditors paid and that eventually they too would be paid. This agreement was so far executed that the business continued approximately five or six weeks during which the bank honored all checks of the bankrupt and paid out approximately $4700 but not to eastern creditors as it had agreed to do. On January 25th, the date of adjudication, the bank had on hand $8300, which it applied to the bankrupt's note to the bank. The District Court said:

> "Special or specific deposits do not create the relation of debtor and creditor, but are in the nature of a trust. The special contract by virtue of which the bank receives them is inconsistent with and avoids the otherwise right of lien and set-off implied in the ordinary contract of deposits. * * * In so far as some thereof (deposits) were paid for current expenses and other accounts, it was implied from the beginning, or

was a more or less necessary modification by conduct from time to time, to execute the agreement and to continue the plan. * * * Moreover, the law is equally well settled that he who secured possession of property or money upon his agreement to make certain disposition or application of it, is obligated to perform accordingly or to return the thing to him from whom possession is received. He cannot repudiate his contract, and in advantage of his wrong, otherwise dispose of the thing to his own benefit." (Hanover Bank v. Suddath; Smith v. Sanborn State Bank, 126 N. W. 779.)

In affirming the case, *Union Bank & Trust Co. v. Loble,* 20 Fed. (2d) 124, Judge Gilbert, writing the decision for C. C. A., held that there was no fraudulent preference.

"**But a bank may so deal with a depositor as to waive or be estopped to assert the right of setoff.** Michie, Banks and Banking, 1027. **And the right does not exist where the circumstances are inconsistent with its exercise.** (Citing cases.) Nor where the principles of legal or equitable setoff do not authorize it. (Citing cases.) On these grounds we think the decision of the court below is sustainable. While the money realized on the special sale and deposited to bankrupt's current account and subject to its check for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of setoff, **we are inclined to the view that the circumstances under which the fund was created, and the cooperation of the bank and the bankrupt in its creation, were sufficient to so far impress**

upon it the character of trust fund that the bank should be held estopped to assert a lien thereon or the right of setoff. (Quoting from 16 F. (2d) 986, as follows:) 'It is moreover to be noted that, before and at the time the bank applied these amounts to its own use, it, the bankrupt, and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern by securing the general acceptance of a scheme of reorganization which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank, which both it and the bankrupt intended should be used for the reduction of the former's debt, were obviously not made in ordinary course, in any fair sense of the phrase."

In

Ballow v. Farmers Bank etc., 45 S. W. (2d) 882,

where the facts are quite comparable to those in the instant case, the court said:

"There is no doubt about the general rule that when a depositor is indebted to a bank, and the debts are mutual, that is, between the same parties and in the same, the bank may apply the deposit to the payment of the debt due it by the depositor. However, the rule is subject to the exception that set-off will not be allowed where its natural consequence will be to give the bank a preferential advantage over other creditors, or where it is contrary to the agreement under which the deposit was made, *or where the bank has dealt with the depositor under circumstances in-*

consistent with the exercise of the right of set-off and having the effect of estopping it from asserting or maintaining the right. (Citing many cases.)
* * *

"In other words, defendant fully understood that the funds deposited with it to the account of the trustee were derived solely from the attempted liquidation of Hopper's business; that they were to be used in payment of the claims of his creditors; and that they came into Thomas' hands, and thence into the custody of the bank, impressed with a trust for a specific purpose. It knew as well as any one that the deposits, though they represented sums realized from the sale of Hopper's assets, were nevertheless not made in the usual and ordinary course of Hopper's business, for the usual and ordinary course of Hopper's business ceased when Thomas took charge of it under the scheme for liquidation. The deposit of the trust funds pursuant to such scheme created no relation of debtor and creditor between the bank and Hopper, but rather between the bank and the trustee; and any termination or relinquishment of his trusteeship by Thomas did not serve to change the original character of the deposits.

A case largely on all fours with the one at bar is to be found in the decision of the Supreme Court of Arkansas, in Wimberley v. Bank of Portia, 158 Ark. 413, 250 S. W. 334, 335, from which we quote as follows:

'It is a general rule that funds deposited in the bank for a special purpose known to the bank cannot be withheld from that purpose to the end that they may be set off by the bank against

a debt due it from the depositor. In other words, while it is true that a general deposit by a merchant of money in a bank creates the relation of debtor and creditor and authorizes the bank to use the money as its own, *such result does not obtain when the deposit is made for a special purpose; as, for example, to be paid to creditors.* * * *

'Tested by this rule, we think that the learned chancellor erred in finding in favor of the defendant in this case. * * * A preponderance of the evidence shows that the money was deposited in a bank by A. L. Pickens as a trust fund to be used by Z. C. Wimberley as his trustee in paying off all of his creditors pro rata. * * *' ''

See also:

Merrimack v. Bailey, 289 Fed. 468;

In re Gans & Klein, 14 Fed. (2d) 116 (9th Cir.).

XVI.

THE CIRCUMSTANCES OF THE AGREEMENT ENTERED INTO BETWEEN THE BANKS RESPECTING RESTORATION OF BALANCES TO ENABLE THE RICHFIELD COMPANY TO CONTINUE IN BUSINESS AND AVOID BANKRUPTCY ARE INCONSISTENT WITH THE RIGHT OF THE BANK TO EXERCISE ITS BANKER'S LIEN OR RIGHT OF SET-OFF.

In *Union Bank etc. v. Loble,* 20 Fed. (2d) 124 (9th Circuit, C. C. A.) it was held that

> "Where a bank, with the knowledge of the bankrupt's failing circumstances, suggested that bankrupt conduct a special sale to raise money to pay certain creditors with a view to reorganizing and continuing the business, the fund realized on such sale and deposited in the bank, held impressed with character of a trust fund so as to exempt it from bank's claim to right of set-off against debt owing it from bankrupt."

Union Trust Co. v. Peck, 16 Fed. (2d) 986 (C. C. A.)

> "It is, moreover, to be noted that before and at the time the bank applied these amounts to its own use, it, the bankrupt and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern by securing the general acceptance of a scheme of reorganization which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank which both it and the bankrupt intended should be used for the reduction of the former's debt were obviously not made in the ordinary course in any fair sense of that phrase. Most men would feel that it is an implied term of such negotiation that during their pendency

nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began, or upon which it did not then have a prior lien."

Ballow v. Farmers Bank, 45 S. W. (2d) 882.

"The general rule is subject to the exception that set-off will not be allowed where its natural consequences will be to give the bank a preferential advantage over other creditors or where it is contrary to the agreement under which the deposit was made, or where the bank has dealt with the depositor under circumstances inconsistent with the exercise of the right of set-off and having the effect of estopping it from asserting or maintaining the right." (Citing cases.)

XVII.

APPELLANT'S CLAIM THAT THE EVIDENCE INTRODUCED IN THE LOWER COURT WAS LEGALLY INEFFECTIVE TO ESTABLISH A WAIVER OF ITS BANKER'S LIEN AND RIGHT OF SET-OFF IS LACKING IN MERIT, AND THE AUTHORITIES RELIED UPON FAIL TO SUSTAIN ITS POSITION.

The sufficiency of the evidence to sustain the findings of the lower court, as well as the legal effect of the court's determination, has already received attention in the preceding pages of this brief. We believe it proper, however, to briefly comment on some of the contentions advanced by appellant under this title, and to refer to a very few of the authorities upon which it relies.

A. Status of drafts deposited under acceptance agreements.

Appellee concedes that if the drafts here involved were not deposited under the acceptance agreement, but in the ordinary course of business, and in the absence of any special agreement or the waiver of January 16, 1931, appellant would be entitled to subject such drafts and their proceeds to its statutory banker's lien, or its contractual right of set-off. The authorities cited by appellant undoubtedly support this concession. It is not and never has been challenged by appellee.

But if the drafts here in controversy were not deposited under the acceptance agreement and the decision of the lower court with respect to the so-called Hall agreement is sustained by the evidence, and it has the legal effect imputed to it by appellee, OR if the evidence is sufficient to support the determination

of the lower court that by its agreement of January 16, 1931, appellant waived its banker's lien, as well as its right of set-off as to all drafts and their proceeds, excepting those placed under the acceptance agreement, then undoubtedly its banker's lien and right of set-off which it otherwise could have exercised, no longer existed, and its claim to the drafts here involved and their proceeds, is lacking in foundation.

B. Authorities cited by appellant and its criticism of authorities relied on by appellee.

In its brief appellant undertakes to analyze some of the authorities cited by appellee in the court below in support of its claim that by the so-called Hall agreement, as well as by the agreement of January 16, 1931, appellant's banker's lien and right of set-off as to the long term drafts were waived. We will not attempt to comment upon such analysis because many of the decisions are herein set forth and speak for themselves. These cases enunciate a rule given universal recognition which, applied to the proven facts in this case, conclusively clothes the drafts herein involved and their proceeds with the status which effectively prevents appellant from exercising thereon any alleged banker's lien or right of set-off. They apply with equal force to the agreement of January 16, 1931, entered into between the receiver and appellant, to which reference has already and will hereafter be made. The decisions cited in support of appellant's contention are not out of harmony with those cited by appellee.

While, in the absence of any special agreement or circumstances exempting the deposited funds from the statutory lien privileges enjoyed by bankers, the cases hold that such privileges are properly enforceable, they specifically point out that when it has been established, either by an express agreement or by attending circumstances, that the deposit was not made in the ordinary course of business or was charged with the subservience of a special burden or purpose, or constitutes a trust fund, that the right to banker's lien or right of set-off no longer exists.

In

Goodwin v. Barre Trust Co., 100 Atl. 34, cited by appellant (p. 78), in holding that a motion for a directed verdict was properly overruled, the court said:

> "But the plaintiff's evidence tended to show that it was expressly agreed that the defendant would not keep the money but would turn it over to the bankrupt. Mr. Cutler testified that he told Mr. Drew, when the latter came to him and asked to have the two drafts here in question turned over to the defendant for collection to save expense, that he did not want to do it because he *'was afraid the bank would gobble all the money'* and he wanted it to pay to the other creditors; and that Mr. Drew assured him that the bank would not keep the money but would turn it over to him. **Here, then, was an express agreement not to assert a lien. Against such an agreement a lien would not stand. A banker's lien does not apply when there is a contract, expressed or implied, inconsistent with such lien.** (Citing 1 Jones on Liens, sec. 244.) **The lien does**

> not apply when the circumstances or a particular mode of dealing are inconsistent with such lien." (Citing cases.)

The case of

Minard v. Watts, 186 Fed. 245,

cited by appellant (pp. 97 and 98), is not in point because it was there stipulated by the parties as follows:

> "that there was not at any time any express agreement or understanding between Henry Minard or the Garrett Biblical Institute, or either of them, on the one part and the First National Bank on the other part, **that the deposits or any of them referred to in the bill of complaint in this case were to be held or kept separate and distinct from the general funds of the bank.**"

It was because of this stipulation that the court said:

> "Therefore the transaction here involved, being one of deposit, the legal status of the parties thus created must be either that of bailor or bailee or of creditor or debtor, for no other legal relation can arise out of the act of one depositing money with a bank."

The court therefore concluded:

> "As it is stipulated by the parties that there was *no express agreement or understanding* between the parties in this case *that the deposit made should be considered as special, and as there was nothing in the character of the transaction had in this case from which there may be found an implied agreement or understanding between the parties to that effect,* it must be held that the deposits were made general and not special."

In

Joyce v. Auten, 179 U. S. 591,

(cited by appellant, p. 78), the court said:

> "It is a familiar law that a bank receiving notes for collection is entitled **in the absence of a contract, express or implied to the contrary** to retain them as security for the debt of the party depositing the notes." (Citing cases.)

In

Garrison v. Union Trust Co., 102 N. W. 978,

(cited by appellant, p. 78) the court quoted the following language with approval:

> "A banker has a lien on all securities of his debtor for the general balance of his account **unless such lien is inconsistent with the actual or presumed intention of the parties.**"

One of the two principal cases quoted by appellant directly sustains the contention of appellee. The other case is not in point. This becomes readily apparent from an examination of these decisions.

In

American Surety Co. v. Bank of Italy, 63 Cal. App. 149 (supra, p. 147),

the question involved was whether a certain deposit constituted a trust fund. Ernest Green, a building contractor, received moneys from the owner of a garage under construction to be used by him in paying the claims of laborers and materialmen. He deposited this fund in a bank with which he had been doing business under the following designation, "Ernest Green, Silva Garage". The lower court held that the fund was a trust fund. The appellate court,

however, held that the evidence was insufficient to show that Green had entered into any agreement with the bank respecting such deposit, or that the bank knew the purpose for which the deposit had been created. The decision, however, recognizes that under evidence such as is found in the record in the case at bar, appellant would not be authorized to exercise its banker's lien or right of set-off upon funds deposited pursuant to such agreement. This is clearly shown by the following language found at page 157 of the decision:

> "Such an agreement as the plaintiff claims the evidence shows was made between Green and the bank as to the account in dispute, while creating in a sense a trust relation between the bank and Green as to said account would, strictly, involve merely an agreement on the part of the bank to waive its right to appropriate the moneys deposited in the account as a setoff to any indebtedness of the depositor to it—that is, it would amount only to a waiver of its right of lien. But, be that as it may, no express agreement or understanding between the bank and Ernest Green that the moneys in question were to be used for or appropriated to the payment of the claims of such persons as furnished materials for use in the construction of the Silva Garage and of mechanics and laborers who bestowed labor on said building is shown by the evidence. **Nor is there any direct evidence that Green gave the bank instructions to the effect that the moneys deposited in said account were to be appropriated or applied to a special purpose.** If then there was such agreement or direction to the bank by Green of the asserted special purpose of said account,

> it must be extracted from the circumstances under which the account was opened and made."

And after showing that no such circumstance was reflected by the evidence, the decision proceeds:

> "It is true that the court found that the account in question was marked or designated as indicated upon the suggestion of the officials of the defendant. But that finding derives no direct support from the evidence. There is testimony showing that the 'Milliken' bridge account was so designated on the suggestion of an officer of the defendant, **but there is no testimony, nor does such fact appear in the statement of the stipulated facts, that the 'ear marking' of the account involved herein was suggested by any officer of the bank.**"

That part of the decision in which the court says:

> "A banker is not required to go 'snooping' about to learn from what source his depositors obtain the moneys which they deposit in his bank"

quoted by appellant in its brief is directed to the proposition that the bank was put upon inquiry as to the source from which Green obtained the moneys deposited in said account by the fact that the account was designated "Ernest Green, Silva Garage". In the concluding paragraph of the opinion, however, the court clearly makes manifest that if the facts were as indicated by the record here the judgment of the lower court would have been affirmed. There it is said (p. 163):

> "Counsel ask this court, if a reversal of the judgment herein be ordered, to order the court

> below to enter judgment upon its findings and the agreed statement of facts for and in favor of the defendant. This we think we should not do. Upon a retrial a different state of facts might be shown upon the question of notice to the bank **or of an agreement between the latter and Ernest Green that the account in question was opened for the use and benefit of a special purpose.''**

An examination of the case of

Updyke v. Oakland Motor Car. Co., 53 F. (2d) 369,

(the remaining case referred to) will quickly disclose that it is not in point.

There it was claimed that the Oakland Motor Car Company had by an agreement waived its right of set-off. In holding that the proof failed to measure up to the claim the court said:

> "But Stratton never claimed that Oakland, in terms, promised not to exercise the right of set-off or that the payment was to be *a special deposit in Stratton's favor* or was to be applied by Oakland in some specific way."

It must be apparent that the facts in case just cited are not at all comparable to those proven in the case under discussion. At the time the agreement between Hall and the bank was made the Richfield Company was indebted to the bank in the sum of $625,000 which was to shortly mature. It was to satisfy this very indebtedness that the appellant herein exercised its banker's lien and right of set-off. It was because of this indebtedness, as well as to prevent the foreign collections being utilized in its payment, that Hall

insisted that the agreement testified to by Hall and Pope be made. That the agreement was in fact made was proven not only by Hall and Pope, but by Lipman and Hellman. If the agreement was in fact made, its only purpose was to prevent the doing of the acts which are here complained of. If the foreign drafts were deposited pursuant to the so-called Hall agreement, under the authorities heretofore cited by appellee, they were not deposited in the "ordinary course of business" and therefore constituted a special or trust deposit which was not subject to the exercise of any banker's lien or right of set-off. Most certainly the circumstances proven indicated a particular mode of dealing which was inconsistent with the existence or the exercise of a banker's lien, or right of set-off, and which under the authorities hereinbefore cited, estopped appellant from asserting or maintaining such claimed right.

C. Mechanics' liens not comparable to bankers' liens.

We do not believe it at all essential to engage in a discussion respecting the analogy between the present case and cases involving a waiver of mechanics' liens. In each of the cases cited by appellant the work for which the lien was claimed was done in conformity with a written contract in which was made no mention of the alleged waiver of lien. In holding that no waiver was shown, considerable reliance was had upon the terms of the written agreement and the circumstance that the waiver attempted to be shown was inconsistent with its language. The cases cited either hold that the waiver could not be shown be-

cause inconsistent with the language of the agreement, or that in view of the language of the agreement the alleged waiver had to be established by clear and convincing evidence.

In the instant case it is not claimed that the so-called Hall agreement in any way affected the collections deposited as security under the acceptance agreement. The contention is that it related and applied only to those drafts which were not deposited under such acceptance agreement. Therefore, the rule declared in the so-called mechanics' lien cases is without application.

D. The transmission of proceeds to receiver.

Under this heading it is asserted that appellee seeks to aid his case for waiver by relying on the act of appellant in crediting to the account of the receiver proceeds of drafts previously deposited with appellant.

In support of this statement it cites the case of *Bell v. Hutchison Lbr. Co.,* 145 S. E. 160, in which it is held that the application of certain funds to other indebtedness of a corporation does not amount to a waiver or abandonment of a lien. Apparently counsel for appellant fail to appreciate the force or effect of the evidence referred to by them or the claim made by appellee with respect to such evidence. It is not contended that the mere crediting of these funds to the account of the receiver in and of itself constituted a waiver. The claim is that the conduct of appellant in voluntarily and without request de-

positing to the credit of the receiver the proceeds of drafts which appellant now claims were deposited under the acceptance agreement and, therefore, subject to its provisions which, in the absence of such waiver, could be offset to satisfy in part the indebtedness due to it, is convincing evidence, *first,* that the drafts were not deposited under the acceptance agreement; and, *secondly,* that appellant had, as a matter of fact, by its agreement of January 16, 1931, waived any statutory or contractual lien that it might theretofore have had upon said drafts or proceeds. In other words, it was conduct consistent only with the claims advanced by appellee and entirely inconsistent and at variance with the defense which it now asserts.

XVIII.

APPELLANT'S CLAIM THAT THERE WAS NO CONSIDERATION FOR A WAIVER OF LIEN BY APPELLANT AFTER THE APPOINTMENT OF THE RECEIVER.

The claim made by appellant that there was no consideration for the agreement of January 16, 1931, is based upon a misconception of the status of the receiver and the effect of his appointment.

When a receiver is appointed for a corporation, to the extent to which the order appointing him confers upon him power and authority, he stands in the shoes of the corporation and acts as the representative not only of the court but of the corporation, its creditors and stockholders. While the effect of the appointment of an equitable receiver for a corporation is not comparable to the latter's dissolution, nevertheless to the extent to which the receiver is empowered to act, the functions of the corporation cease.

When a receiver is appointed to take possession of all property and assets of a corporation and to carry on its business, and is further authorized to institute such litigation as may be necessary to enforce the provisions of the order and to collect all outstanding claims, and an injunction is issued restraining interference with his powers by the corporation, its agents and all other persons, in performing the duties and obligations thus imposed upon him, he occupies the position previously occupied by the corporation. While he takes its property and assets subject to all outstanding liens and claims, he is clothed with the power of asserting and enforcing all rights that at the time of his appointment were pos-

sessed by the corporation. In carrying on its business he possesses the same power that would have been possessed by the corporation had the receivership not occurred, and, where authorized, he has the right to enter into such contracts as in his judgment may be necessary to carry on and conduct the business entrusted to his care.

It is obvious, therefore, that McDuffie's authority extended to the making of the agreement of January 16, 1931, and we are thus brought to the proposition as to whether such agreement was based upon a valid consideration. The receivership was initiated to enable the business of the Richfield Oil Company to be carried forward and to avoid bankruptcy. The agreement on the part of appellee to continue as such receiver and to carry on the business of the company and thus avoid its bankruptcy, itself would be a sufficient consideration for making the agreement claimed. But it is a well-recognized principle of law that any consideration received by a person making an agreement, even though such consideration did not emanate from the other party to the agreement, is itself sufficient in law to support the agreement. This is made manifest by Section 1605 of the *Civil Code* (Cal.) which provides:

> "Any benefit conferred or agreed to be conferred upon the promisor by *any other person* to which the promisor is not lawfully entitled, or any *prejudice* suffered or agreed to be suffered *by such person* other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise."

The evidence without dispute shows that in consideration of appellant's agreement of January 16, 1931, certain other bank creditors restored cash balances to Richfield which had already been offset, and agreed not to exercise their right of offset as against cash balances not already interfered with. The evidence further proved that in reliance upon said agreement of appellant, the Security Bank not only restored the cash balances of the Richfield Company already offset by it, but subsequently turned over to the receiver collections aggregating $152,000 upon which it had the legal right to exercise its banker's lien and right of set-off.

While appellant, being a creditor of Richfield and interested in its efforts to avoid bankruptcy, benefited by what the other banks did, this element is not important because the other bank creditors actually *suffered a prejudice* to the extent of the moneys relinquished by them to Richfield Company in consideration of the agreement made by appellant.

Further discussion of this matter we deem nonessential.

XIX.

APPELLANT'S CLAIM THAT ESTOPPEL CAN BE RELIED ON ONLY BY A PARTY TO THE ACTION.

Having demonstrated that the agreement of January 16, 1931, was based upon a good and enforceable consideration, the question of estoppel becomes one of no particular moment. If, however, the court is of the opinion that the element of estoppel is at all important, the proven facts in this case have established an estoppel against appellant which would prevent it from successfully asserting that the agreement was unenforceable because of want of consideration.

The agreement of January 16, 1931, in legal effect is a tri-party agreement. It was made immediately following the date of the appointment and qualification of the receiver. It was an agreement which, as we have already shown, under his order of appointment the receiver had a right to make. It was made by the receiver in his representative capacity for and on behalf of the corporation whose assets, property and business he represented, as well as the creditors and stockholders interested therein. But aside from these facts, while it was directly made between the receiver and appellant, it also involved the agreements of the various bank creditors, which latter agreements depended upon the agreement of the appellant. Under these circumstances the bank creditors were not only beneficiaries of the agreement, but in legal effect, were parties thereto.

It appears in evidence without dispute that in consideration of and in reliance upon the appellant's agreement, the receiver remained in his position and

continued to carry on the business of the Richfield Company. It also appears without dispute that in consideration of and in reliance upon the agreement with appellant, the other bank creditors actually performed the things agreed to by them which, as to the Security Bank, included the payment to the receiver of the proceeds of the collections theretofore deposited with it upon which, in the absence of the agreement, it could—and probably would—have exercised a banker's lien and right of set-off.

Assuming that any doubt could possibly exist with respect to consideration, an estoppel *in pais* has been demonstrated which effectually prevents appellant from successfully asserting any such defense.

Seymour v. Oelrichs, 156 Cal. 782 at 794.

The principle that

> "estoppels operate only between parties and privies and the party who represents an estoppel must be one who has in good faith been misled to his injury"

may be conceded. The facts herein involved and proven by the evidence, as above pointed out, bring this case within the principle stated. Not a scintilla of evidence was introduced which would justify the assumption that either the receiver or the bank creditors would have acted as they did except for the belief that the agreement of January 16, 1931, was a valid agreement and that appellant was equally bound with them to measure up to its requirements and perform the obligations with which they were all burdened.

That the receiver, as such, is not entitled to enforce this estoppel is equally untenable.

If, as already pointed out, the receiver, for the purposes of this litigation, represents the corporation as well as those interested therein including its creditors, then necessarily he is clothed with all of the rights that could have been asserted and enforced by the corporation if the action had been instituted by the corporation. There can be no question but that after his appointment the corporation itself could not institute or maintain this action. There is likewise no doubt but that after his appointment, considering the terms and provisions of the order appointing him, he and he alone could institute and maintain this action. It is equally free from doubt that the pending action was in fact brought by the receiver in a representative capacity for and on behalf of the corporation and those interested therein. This agreement, although made with the receiver, was in fact entered into by him on behalf of the corporation. It seems futile, therefore, for appellant to argue that under such circumstances the rights possessed by the corporation and the remedies available to it cannot be asserted and pursued by the receiver, the only person authorized to institute and maintain the action.

That the status of the receiver is as has been indicated is clearly shown by the authorities. In

Westinghouse etc. v. Binghampton R. Co., 255 Fed. 378, at 385,

it is said:

> "A receivership is for the benefit and protection of all interests, general creditors, secured creditors (bondholders) and stockholders, and it is the duty of the court, so far as reasonably possible, to conserve and protect all interests."

In

53 *C. J.*, Sec. 163, page 137,

the rule is thus stated:

> "So the acts of a receiver are the acts of the court for which he acts, *and, his appointment being for the benefit of all parties interested,* he holds and manages the property for the benefit of those ultimately entitled, and not primarily for the benefit of the party at whose instance the appointment was made."

And in describing the capacity in which a receiver acts in instituting and prosecuting an action, at

53 *C. J.*, Sec. 537, page 324,

with reference to the status of a receiver in the prosecution of an action, it is stated:

> "The general rule is that a receiver takes the rights, causes and remedies which were in the corporation, individual or estate whose receiver he is, or which were available to those whose interests he was appointed to represent. Where a claim asserted by or against a receiver affects the interests of all the parties in the property alike, the receiver is the proper party to bring or defend the action, *and a receiver representing all the parties to a subscription to a common purpose may maintain an action against one of the persons so represented for a sum due from that one to the whole body represented, although defendant may be ultimately entitled to a share of the proceeds of such suit.* And, subject to some qualifications and exceptions, especially provided for by statute or the rules of equity authorizing a receiver to sue in the interests of creditors, he stands in the shoes of such person or estate and can enforce only such rights and contracts, or maintain only

> such action or defense as could be enforced or maintained by any such person or estate."

A multitude of cases from many jurisdictions, both federal and state, could be cited in support of these principles, but we deem such citation unnecessary. An examination of the cases cited by appellant to this point will show that to no extent whatever does any of them qualify the legal principles above set forth.

XX.

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY REGARDING THE MEETINGS OF THE RICHFIELD BANK CREDITORS AND THE COMMUNICATIONS PASSING BETWEEN SUCH CREDITORS AND THE RECEIVER.

It is claimed by appellant that the lower court erred in admitting in evidence the discussion which occurred between Mr. McDuffie, receiver of the Richfield Company, and its bank creditors at the meeting which followed the appointment of the receiver. The appointment was made on January 15, 1931, and the meeting to which reference is made occurred the following day, January 16, 1931. In its brief appellant states that Mr. McDuffie and Mr. Nolan were allowed to testify over the objection of appellant as to what was said at both of said meetings. (p. 165.) In this, however, appellant is mistaken. With respect to the meeting held on January 14, 1931, the evidence merely disclosed the holding of the meeting and the persons present. No inquiry was made respecting what was said at such meeting. (R. 205.) In this connection it might be proper to state that the meetings preceding the one on January 16, 1931, were participated in by the banker creditors to whom there was due in excess of ten million dollars, evidently for the purpose of bringing about the receivership. According to the testimony of Mr. Nolan

> "These meetings were held in connection with the outstanding indebtedness for the purpose of protecting banks and the bank's depositors. I recall that Mr. Eisenbach was present at one of these meetings. The bankers were very much concerned about Richfield." (R. 239.)

Over appellant's objection, however, the court did admit evidence disclosing what occurred at the meeting held on January 16, 1931, as well as the telegrams subsequently passing between the creditor banks and the receiver. This evidence, however, was admitted for the limited purpose

> "of establishing a waiver and estoppel against defendant with respect to its subsequent right to exercise its alleged banker's lien and right of set-off and conceded that said testimony would not be binding on defendant except to the extent to which information was afterwards communicated to defendant respecting what occurred at said bankers' meetings." (R. 240.)

The court will recall that the proposed receivership was to protect and conserve the assets of Richfield and enable the receiver to carry on its business for the benefit of its creditors, among others, its banker creditors. That at the meeting last above referred to the receiver insisted that if he was to remain in that capacity and conduct the receivership, all of the bank creditors would have to agree that the funds and credits in their possession belonging to the Richfield Company should be available to the receiver and that those that had exercised their banker's lien or right of set-off as against such credits and deposits should forthwith restore them and the remaining banks should agree not to exercise such right; otherwise the receiver would retire and the company would become bankrupt.

During the course of the meeting and after the receiver had stated its purpose, as well as his attitude in the matter, the bank creditors who were present

agreed to comply with the receiver's requirements, provided compliance therewith was agreed to by all other bank creditors. Thereupon the receiver's telegram of January 16, 1931 (Plff's. Ex. 2), was prepared by a committee of the bankers present and transmitted to each of the banker creditors. Thereupon Mr. Nolan, at the request of Mr. McDuffie, telephoned appellant and communicated to Mr. Eisenbach, its vice-president, one of its executives and chief credit man, the substance of what had occurred at the meeting. (R. 243.) Appellant thereupon prepared and transmitted to the receiver its telegram in response, also dated January 16, 1931. (Plff's. Ex. 3.) Each of the remaining bank creditors likewise responded by wire or communication to the telegram of the receiver acquiescing in his requirements upon the understanding that all other banks would do likewise.

It can readily be understood that this evidence was not only important, but essential to establish

(a) Consideration for the agreement of appellant to restore the bank balances of Richfield which had already been offset by it, and its agreement to waive its banker's lien and right of set-off against the collections in its possession other than those supporting the acceptance agreements.

(b) The fact that other banks had agreed to do likewise; otherwise appellant's agreement would not have been effective, and

(c) To establish that the remaining bank creditors of Richfield relied upon the agreement of each other, as well as of appellant, in restoring

bank balances of Richfield and, as to the Security Bank, in waiving its banker's lien and right of set-off against the collections then in its possession.

In the absence of this evidence, limited exclusively to the purposes hereinbefore indicated, appellant might absolve itself from liability upon the asserted grounds that no consideration existed for its agreement and might successfully claim that the necessary elements of estoppel and waiver had not been shown.

Appellant in its brief admits the purposes for which this evidence was offered. (p. 165.) The record is slightly confusing, however, for the reason that in the court below Mr. McDuffie was withdrawn from the stand in order to enable Mr. Nolan to testify. This evidence was first introduced while Mr. Nolan was on the stand. In the statement of evidence, however, the evidence of Mr. McDuffie is reproduced as though he had not been withdrawn. The limited purpose of the evidence is shown in the testimony of Mr. Nolan (R. 240), which according to the record appears to have been given after McDuffie testified, whereas in fact the reverse occurred. The purpose having been stated when the evidence was first offered, no subsequent statement was made or was required. The court's ruling, however, with respect to this evidence was necessarily based upon the limitation placed upon it by appellee.

Even assuming, however, that this evidence was objectionable, no prejudice thereby was suffered by appellant. If the so-called Hall agreement is established, the existence or non-existence of the agreement

of January 16, 1931, becomes immaterial. Furthermore, in the absence of this evidence, consideration for the agreement would be presumed. (California Civil Code, Sec. 1614.) Inasmuch as no evidence was introduced by appellant establishing want of consideration, the determination of the lower court would necessarily have to be in accord with the presumption.

CONCLUSION.

We believe we owe the court an apology for the apparent undue length of this brief. We feel, however, that the extent of our efforts may be justified not alone because of our desire to assist the Court in reviewing the evidence, both oral and documentary, but because of the importance of this litigation to our client and our conviction that if properly presented, the integrity of the determination by the lower court will be readily made manifest.

We cannot help but be convinced that within the pages of this brief we have established (a) that it was definitely understood and agreed that the foreign collections of the Richfield Company, deposited with appellant should be considered entirely separate and apart from all other business transactions between Richfield Company and the bank; (b) that only the short-term drafts, and that none of the so-called long-term drafts, including those involved in this appeal and their proceeds, were deposited as security under the acceptance agreements; (c) that the provisions of the acceptance agreements conferring upon appellant a contractual lien attach or fasten themselves only to the drafts deposited thereunder; and (d) that the agreement of January 16, 1931, was not only supported by an adequate consideration, but by its terms, appellant agreed to waive whatever right it had to exercise any lien, either contractual or statutory, upon any drafts or their proceeds, excepting those deposited as security under said acceptance agreements.

It is respectfully but earnestly submitted that the evidence, both oral and documentary, the equities and

justice of the controversy, the conduct of the parties with respect to the matters herein involved, the statutory law of this state and the adjudication of appellate tribunals require that the judgment of the court below should be affirmed.

Dated, San Francisco,
April 2, 1934.

GREGORY, HUNT & MELVIN,
WM. H. HUNT,
WARD SULLIVAN,
SULLIVAN, ROCHE, JOHNSON & BARRY,
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(Appendix Follows.)

Appendix.

Appendix

SCHEDULE A

(Comprising 2 subdivisions)

Schedule of Drafts Claimed by Plaintiff to Have Been Deposited as Security for Acceptances Totaling $155,000.

Subdivision No. 1

Draft No.	Customer	Amount	Date Deposited	Date Paid
103004	Birla Bros. Ltd.	63,950.00	10/ 8/30	12/16/30
103006A	do	55,900.76	10/ 8/30	12/16/30
103009	Ricardo Velazquez	2,442.40	10/ 9/30	1/28/31
103010	Bottiger Trepp y Cia	11,031.14	10/10/30	12/31/30
103012	Buena y Cia	2,441.00	10/12/30	*
103023	Sociedad Automoviliaria	779.10	10/21/30	Unpaid
103026	Rafael Alvarez L. e Hijos	2,446.82	10/28/30	12/27/30
103029	The Nissho Co.	654.55	10/29/30	12/27/30
103030	Empres Dean	1,405.20	10/30/30	2/11/31
113001	Limon Trading Co.	1,209.40	11/ 6/30	2/3/31
113007	Julio Plesch & Co.	1,204.78	11/19/30	2/14/31
113010	J. C. Spedding	1,804.01	11/20/30	2/14/31
113011	Nottebohm Hermanos	103.12	11/20/30	12/13/30
113012	Bottiger Trepp y Cia	1,466.25	11/20/30	2/13/31
113013	Rafael Alvarez L. e Hijos	2,446.82	11/20/30	1/30/31
113014	The Nissho Co.	1,547.50	11/22/30	1/21/31
113017	J. C. Spedding	7,277.35	11/22/30	2/14/31
113019	Nottebohm Hermanos	291.50	11/25/30	12/12/30
113020	Raymundo Diaz	1,200.00	11/25/30	12/18/30
		159,600.50		

*2/24/31 $1500 net proceeds applied on acceptances.
4/7/31 470 " " paid to receiver.
5/11/31 471 " " retained by Bank.

Schedule Showing Drafts Claimed by Plaintiffs to Have Been Deposited as Security for Each Acceptance or Group of Acceptances Executed and Released.

Subdivision No. 2

Draft No.	Date Deposited	Amount	
103004	10/8/30	$63,950.00	
103006A	10/8/30	55,900.76	$119,850.76
Nine acceptances released Oct. 8, 1930, aggregating			115,000.00
	Surplus amount of above two drafts		4,850.76
103009	10/ 9/30	2,442.40	
103012	10/12/30	2,441.00	4,883.40
	Reserve for Acceptances		9,734.16
One acceptance released Oct. 15, 1930, in amount of $5,000 against above reserve of $9,734.16			5,000.00
103010	10/10/30	11,031.14	
One acceptance released Oct. 21, 1930, in amount of $10,000 against above draft of $11,031.14			10,000.00

Five drafts above specified, viz.:		63,950.00
		55,900.76
		2,442.40
		2,441.00
		11,031.14
		135,765.30
Deduct acceptances issued		130,000.00
Surplus of above five drafts		5,765.30
103023	10/21/30	779.10
103026	10/28/30	2,446.82
103029	10/29/30	654.55
103030	10/30/30	1,405.20
113001	11/ 6/30	1,208.40
113007	11/19/30	1,204.78
113010	11/20/30	1,804.01
113011	11/20/30	103.12
113012	11/20/30	1,466.25
113013	11/20/30	2,446.82
113014	11/22/30	1,547.50
113017	11/22/30	7,277.35
113019	11/25/30	291.50
113020	11/25/30	1,200.00
		29,600.50

Four acceptances released Nov. 28, 1930, aggregating $25,000 against above drafts commencing with No. 103023 and ending with No. 113020.

SCHEDULE B

Schedule Relating to Correspondence Authorizing Release of Acceptances Aggregating $130,000 and Claimed by Plaintiff to Show the Particular Drafts Deposited With Bank and Upon Which Said Acceptances Were Executed and Released.

1. Letter dated Oct. 7, 1930, authorizing release of acceptances totaling $115,000, all dated Oct. 8, 1930. (Deft's. Ex. A.)

Draft	Amount	
103004	63,950.00	
103006A	55,900.76	$119,850.76

Acceptances released as follows: (Plff's. Ex. 17)

Date	Amount	Due Date	
Oct. 8, 1930	25,000	Jan. 6, 1931	
"	25,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	10,000	"	
"	5,000	"	115,000.00

Amount of above two drafts deposited in excess of acceptances totaling $115,000 $ 4,850.76

2. Letter dated Oct. 13, 1930, authorizing release of acceptance for $5000. (Plff's. Ex. 28.)

Draft	Amount	
103009	2,442.40	
103012	2,441.00	4,883.40
	Total	$9,734.16

Acceptance released as follows: (Plff's. Ex. 18)

Date	Amount	Due Date
Oct. 15, 1930	5,000	Jan. 13, 1931

3. Letters dated Oct. 20 and 21, 1930, authorizing release of acceptance totaling $10,000. (Plff's. Exs. 30 and 31.)

Draft	Amount
103010	$11,031.14

Acceptance released as follows: (Plff's. Ex. 19)

Date	Amount	Due Date
Oct. 21, 1930	10,000	Jan. 19, 1931

SCHEDULE C

Schedule Showing Drafts Claimed by Plaintiff Not to Have Been Deposited as Security for Acceptances Totaling $155,000.

A

Drafts Deposited on or Prior to Nov. 28, 1930

No.	Amount	Date of Deposit	Reason
103005	63,950.00	10/8/30	180 days' sight
103006B	55,900.75	10/8/30	" " "
103024	1,007.00	10/28/30	Returned—goods not shipped
103025	583.00	10/28/30	Paid to R. O. Co. 11/15/30
103028	1,204.78	10/28/30	Returned—goods not shipped
103027	381.60	10/28/30	Estimated that proceeds would not be received in San Francisco prior to Feb. 26, 1931, maturity date of acceptances for $25,000.
113008	1,007.00	11/19/30	
113009	5,256.60	11/19/30	
113018	641.25	11/23/30	
113021	2,237.66	11/25/30	Deposited after request for issuance of acceptances totaling $25,000.
113023	881.13	11/28/30	

B

Drafts Deposited Subsequent to Nov. 28, 1930

123007	1,007.00	12/23/30	Already sufficient drafts under acceptance
123008	2,446.82	12/24/30	"
123009	3,418.90	12/24/30	"
123010	1,266.29	12/24/30	"
123013	2,702.66	12/28/30	"
123014	1,219.00	12/28/30	"
123015	2,692.99	1/7/31	"
13103	53.45	1/7/31	"
13106	11,107.50	1/9/31	"
13107	23,607.50	1/9/31	180 days' sight "
13108	1,197.81	1/15/31	" " " "

SCHEDULE D

Schedule of Correspondence Claimed by Plaintiff to Show Application by Wells Fargo Bank of Proceeds of Drafts to Acceptances Totaling $155,000.

1. Letter dated Dec. 16, 1930: (Plff's. Ex. 93)

Draft No. 103004	$ 63,950.00
" " 103006A	55,900.76
	119,850.76
Less Charges	224.71
Net Proceeds	$119,626.05

Applied in anticipation of maturing acceptances.

2. Letter dated Jan. 3, 1931: (Plff's. Ex. 95)

Draft No. 103010	$ 11,031.14
Less Charges	40.07
Net Proceeds	$ 10,991.07

Applied in anticipation of maturing acceptances.

3. Letter dated Jan. 26, 1931: (Plff's. Ex. 97)

Draft No. 113014	$ 1,547.50
Credit Interest	15.01
	1,562.51
Less Charges	1.93
Net Proceeds	$ 1,560.58

Applied in anticipation of acceptances for $25,000 maturing Feb. 26, 1931.

4. Letter dated Jan. 26, 1931: (Plff's. Ex. 97)

Interest credit memo on acceptance for $5.00 credited to acceptance fund.

5. Letter dated Jan. 28, 1931: (Plff's. Ex. 98)

Draft No. 103009		$ 2,442.40
Credit Interest		45.20
		2,487.60
Less Charges		3.11
Net Proceeds		$ 2,484.49

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

6. Letter dated Feb. 2, 1931: (Plff's. Ex. 99)

Draft No. 113013		$ 2,446.82
Less Charges		3.05
Net Proceeds		$ 2,443.77

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

7. Letter dated Feb. 3, 1931: (Plff's. Ex. 100)

Draft No. 113001		$ 1,208.40
Less Charges		13.59
Net Proceeds		$ 1,194.81

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

8. Letter dated Feb. 4, 1931: (Plff's. Ex. 101)

Draft No. 113023		$ 881.13
Credit Interest		9.85
		890.98
Less Charges		1.10
Net Proceeds		$ 889.88

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

9. Letter dated Feb. 13, 1931: (Plff's. Ex. 103)

(a) Draft No. 113012	$ 1,466.25
Less Charges	6.17
Net Proceeds	$ 1,460.08
(b) Draft No. 123007	$ 1,007.00
Credit Interest	14.10
	1,021.10
Less Charges	1.28
Net Proceeds	$ 1,019.82
(c) Draft No. 103030	$ 1,405.20
Less Charges	8.93
Net Proceeds	$ 1,396.27

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

10. Letter dated Feb. 14, 1931: (Plff's. Ex. 104)

(a) Draft No. 113010	$ 1,804.01
Credit Interest	27.31
	1,831.32
Less Charges	2.25
Net Proceeds	$ 1,829.07
(b) Draft No. 113017	$ 7,277.35
Credit Interest	107.68
	7,385.03
Less Charges	7.38
Net Proceeds	$ 7.377.65
(c) Draft No. 113007	$ 1,204.78
Credit Interest	18.48
	1,223.26
Less Charges	1.50
Net Proceeds	$ 1,221.76

Applied in anticipation of acceptances for $25,000 due Feb. 26, 1931.

11. Letter dated Feb. 26, 1931: (Plff's. Ex. 107)

(a)	Draft No. 113009	$ 5,256.60
	Reduced as per letter of 2/7/31	4,711.43
	Less Charges	44.45
	Net Proceeds	$ 4,666.98
(b)	Draft No. 113018	$ 641.25
	Credit Interest	9.62
		650.87
	Less Charges	.81
	Net Proceeds	$ 650.06
(c)	Draft No. 123008	$ 2,446.82
	Less Charges	3.05
	Net Proceeds	$ 2,443.77
(d)	Draft No. 103012	$ 2,441.00
	Paid on account	1,500.00
	Less Charges	11.53
	Net Proceeds	$ 1,488.47

Recapitulation as to Proceeds of Drafts Referred to in Item 11 (Supra).

Net Proceeds	(a)	$4,666.98
	(b)	650.06
	(c)	2,443.77
	(d)	1,488.47
Total Net Proceeds		$9,249.28
Balance due on Acceptances of $25,000		1,499.70
Net Proceeds after payment of acceptances in full		$7,749.58

Held temporarily by Bank in accord with letter dated Feb. 26, 1931. (Plff's. Ex. 107.)

Subsequently restored to Receiver in accord with Bank's letter of Mar. 5, 1931. (Plff's. Ex. 108.)

SCHEDULE E

Recapitulation of Application of Net Proceeds of Drafts in Payment of Acceptances Aggregating $155,000 as Disclosed by Foregoing Letters of Bank.

Item No.	Amount
1	$119,626.05
2	10,991.07
3	1,560.58
4	5.00
5	2,484.49
6	2,443.77
7	1,194.81
8	889.88
9 (a)	1,460.08
(b)	1,019.82
(c)	1,396.27
10 (a)	1,829.07
(b)	7,377.65
(c)	1,221.76
11 (a)	4,666.98
(b)	650.06
(c)	2,443.77
(d)	1,488.47
	$162,749.58
Surplus Credits to Receiver	7,749.58
Total Applied in Full Payment of Acceptances	$155,000.00

SCHEDULE F

Schedule of Drafts Deposited With Wells Fargo Bank Prior to Receivership, Proceeds of Which Were Received by Bank After Receivership and a Portion Thereof Applied to Acceptances and Balance Credited to Receiver.

Draft No.	Customer	Amount of Draft	Net Proceeds	Date Proceeds Credited to Receiver
*103012	Bueno y Cia	2,441.00	$1,488.47	
113009	Limon Trading Co.	5,256.60	4,666.98	
113018	Miguel Duenas	641.25	650.06	
123008	Rafael Alvarez L. e Hijos	2,446.82	2,443.77	
			9,249.28	
	Deduct balance due on acceptance		1,499.70	
	Balance Credited Receiver		$7,749.58	3/5/31

SCHEDULE G

Schedule of Drafts Deposited With Wells Fargo Bank Prior to Receivership, Proceeds of Which Were Received by Bank Also Prior to Receivership and Credited to Account of Richfield Oil Company Without Right of Offset.

Draft No.	Gross Amount	Net Proceeds	Date Deposited	Date Paid
103025	$ 583.00	$ 576.12	10/27/30	11/15/30
103026	2,446.82	2,443.76	10/27/30	12/27/30
103029	654.55	660.68	10/28/30	12/27/30
113011	103.12	101.37	11/19/30	12/12/30
113019	291.50	287.78	11/24/30	12/12/30
113020	1,200.00	1,186.15	11/24/30	12/18/30
Total	$5,278.99	$5,255.86		

SCHEDULE H

Schedule of Drafts Deposited With Wells Fargo Bank Prior to Receivership, Proceeds of Which Were Received by Bank After February 26, 1931, and Credited to Account of Receiver Without Claim to Offset.

Draft No.	Gross Amount	Net Proceeds	Date Deposited	Date Paid
13106	$11,107.50	$11,082.51	1/8/31	3/5/31
13108	1,197.81	1,209.81	1/15/31	3/23/31
*103012	2,441.00	468.05	10/11/30	4/7/31
103027	381.60	387.35	10/27/30	3/9/31
113008	1,007.00	1,019.47	11/18/30	3/19/31
113021	2,237.66	2,223.53	11/24/30	3/23/31
123009	3,418.90	3,382.54	12/23/30	3/24/31
123010	1,266.29	1,264.71	12/13/30	4/4/31
123013	2,702.66	2,743.94	12/27/30	3/30/31
123015	2,692.99	2,682.22	12/27/30	4/22/31
Total		$26,464.13		

*On February 20, 1931, $1,500.00 was paid on account of this draft, the net proceeds amounting to $1,488.47 being applied towards payment of acceptances aggregating $25,000, as shown in Schedule D.

On April 7, 1931, $468.05 was paid on account of the balance due on this draft, $1,488.47 having been previously paid. This sum was credited to the account of the receiver. Subsequently, and on May 11, 1931, the balance, amounting to $471.00, was paid, which was retained by the Bank under its alleged lien or right of offset.

SCHEDULE I

Schedule Showing Total Proceeds of Drafts Paid to Richfield Oil Company and (or) to Receiver Without Claim of Offset.

Total proceeds of drafts paid to Richfield Oil Company, as per Schedule G	$ 5,255.86
Surplus proceeds of four drafts paid to Receiver after payment in full of acceptances, as per Schedule F	7,749.58
Total proceeds of remaining drafts paid to Receiver after payment in full of acceptances, as per Schedule H	26,464.13
Total	$39,469.57

SCHEDULE J

Schedule of Drafts Which Plaintiff Claims Were Deposited as Security for Acceptance Totaling $155,000 and Showing Proceeds of all Drafts Used to Liquidate Acceptances.

Draft No.	Gross Amount	Net Amount	Date Deposited	Date Paid
103004	$ 63,950.00)	$119,626.05	10/8/30	12/16/30
103006A	55,900.76)		10/8/30	12/16/30
103009	2,442.40	2,484.49	10/9/30	1/28/31
103010	11,031.14	10,991.07	10/10/30	12/31/30
103012	2,441.00	1,488.47	10/12/30	2/24/31
103023	779.10		10/21/30	Unpaid
103026	2,446.82	*	10/28/30	12/27/30
103029	654.55	*	10/29/30	12/27/30
103030	1,405.20	1,396.27	10/30/30	2/11/31
113001	1,208.40	1,194.81	11/6/30	2/3/31
113007	1,204.78	1,221.76	11/19/30	2/14/31
113010	1,804.01	1,829.07	11/20/30	2/14/31
113011	103.12	*	11/20/30	12/12/30
113012	1,466.25	1,460.08	11/20/30	2/13/31
113013	2,446.82	2,443.77	11/22/30	1/30/31
113014	1,547.50	1,560.58	11/22/30	1/21/31
113017	7,277.35	7,377.65	11/22/30	2/14/31
113019	291.50	*	11/25/30	12/12/30
113020	1,200.00	*	11/25/30	12/18/30
	$159,600.50	$153,074.07		

*Proceeds paid to Richfield Oil Company of California.

**113009	4,666.98	2/25/31
**113018	650.06	2/20/31
**113023	889.88	2/4/31
**123007	1,019.82	2/13/31
**123008	2,443.77	2/20/31
	$ 9,670.51	
	153,074.07	
	$162,744.58	
Interest memorandum 1/19/31	5.00	
	162,749.58	
Deduct acceptances	155,000.00	
Surplus paid receiver 3/5/31	$ 7,749.58	

**Note: Drafts claimed by plaintiff not to have been deposited as security for acceptances, but proceeds of which were applied by Bank to payment of acceptances.

SCHEDULE K

Schedule of Drafts and Proceeds of Drafts in Litigation.

Draft No.	Customer	Net Amount	Date Deposited	Date Paid
103005	Birla Bros. Ltd.)	$119,512.54	10/7/30	6/10/31
103006B	")			
123014	Ricardo Velazquez	1,245.11	12/27/30	5/18/31
103012	Bueno y Cia	469.06	10/11/30	*
13107	Birla Bros. Ltd.	23,532.08	1/8/31	9/10/31
		$144,758.79		

*$1500 paid 2/24/31.
470 paid 4/7/31.
471 paid 5/11/31 but withheld by Bank.

SCHEDULE L

Security-First National Bank of Los Angeles.

Schedule of Drafts—Not Discounted—Deposited Before Receivership, Proceeds of Which Were Paid and Credited to the Receiver's Account.

Draft No.	Face Amount	Date Deposited	Date Paid	Customer
93021	$ 37,138.50	9/17/30	5/21/31	Birla Bros. Ltd.
93026	1,038.80	9/21/30	4/22/31	Sociedad Automoviliaria
103002	572.40	10/3/30	7/27/31	" "
103018	53,941.49	10/18/30	4/7/31	H. C. Sleigh
13105	59,832.84	1/8/31	7/24/31	" " "
	$152,524.03	Total Funds Received from Undiscounted Collections		

No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO. (a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

GREGORY, HUNT & MELVIN,
WM. H. HUNT,
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Attorneys for Appellee and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

No. 7344

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Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, William H. Sawtelle and Francis A. Garrecht, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

A rehearing of this controversy is respectfully, but earnestly, requested by appellee. While the reasons upon which this request is predicated are hereinafter particularized, the principal ground urged by appellee is that the decision of this controversy by this court resulting in a reversal of the judgment entered by the court below in favor of appellee, is in our opinion based upon an assumption of facts not justified by the record, and a determination as to the law at variance and inconsistent with legal principles, the

accuracy of which has been demonstrated by utterances of appellate judicial tribunals of eminent authority, including this court, and, in at least some instances, expressly given recognition by appellant in its brief.

The particular grounds upon which such rehearing is requested are hereinafter discussed under appropriate headings.

FOREWORD.

At the very threshold of this petition we respectfully draw the court's attention to the fact that although the judge of the lower court made findings of fact which were addressed to the issues and bear witness to the painstaking care with which he determined questions of fact based upon evidence to some extent conflicting, given by witnesses whose conduct and demeanor while testifying he personally observed, no mention of or reference to these findings is made in the statement of the case or in the opinion of this court, but on the contrary this court has undertaken to weigh the evidence and determine the facts as though it were a trial court, and this without having had the benefit of opportunities peculiarly possessed by the trial judge.

If, as recognized by this court, this controversy was instituted as a proceeding in equity, yet when tried it took the form of an action at law and was determined as such, it would follow that the findings of the lower court based upon conflicting evidence are

controlling in this court. On the other hand, if the proceeding when tried was still one in equity, unless the decision of the lower court upon the questions of fact involved was clearly erroneous, such determination ought not to be interfered with by an appellate court.

This rule, heretofore consistently adhered to, has, we insist, been ignored by this court in reversing the judgment entered in favor of appellee in the court below. We may therefore submit that appellee is entitled to ask the careful consideration of this petition presented to this court as an appellate court which has reversed judicial ascertainment of the facts found by the trial court.

Our duty, therefore, to this court makes it obligatory in this petition to refer somewhat at length to the evidence. Our apology for the length of this petition is traceable to this circumstance.

I.

THE HOLDING BY THIS COURT THAT PAROL EVIDENCE WAS CONFINED TO PROOF OF THE DELIVERY OF THE BILLS OF LADING ALONE IS ONE OF ORIGINAL IMPRESSION BY THIS COURT, IN CONFLICT WITH THE CONTENTION OF BOTH PARTIES AND THE ADMISSIONS OF APPELLANT AND WAS NEITHER DISCUSSED NOR GIVEN CONSIDERATION IN THE BRIEF FILED BY EITHER OF THE PARTIES HERETO. BY THIS HOLDING, APPELLEE HAS BEEN DEPRIVED OF A JUDGMENT OBTAINED BY HIM UPON A THEORY WITH RESPECT TO WHICH HE HAS NOT BEEN ACCORDED THE OPPORTUNITY OF BEING HEARD.

In its opinion this court upon this subject used the following language:

"It is agreed that the acceptance agreement, although in writing, does not of itself sufficiently identify the documents or security which was the subject matter of the contract between the parties without the consideration of parol evidence." (p. 7.)

It is also stated:

"The appellee correctly contends that the written agreements must be construed according to their terms, and that these terms are conclusive as to the agreement between the parties, *but that the references therein to drafts and other documents may be explained by parol evidence.*" (p. 2.)

It is finally concluded that:

"The transaction between the parties was evidenced with clarity and definiteness by the written acceptance agreement, by the written documents accompanying the agreement, by the written acceptances indorsed by the bank and by the letters exchanged and by the credit released to the Richfield Oil Company upon nine drafts presented to the bank for acceptance *and needed no additional parol evidence to identify the subject-matter of the contract and establish its terms.*" (p. 8.)

As indicating what parol evidence was admissible to identify the security, it is stated:

"But the delivery of the bills of lading clearly identifies such consideration." (p. 7.)

The court's lack of authority to limit the introduction of parol evidence to the delivery of the bills of

lading, where parol evidence is admissible, will hereafter be discussed. Presently, however, we are alone concerned with pointing out to the court that the legal proposition involved in this portion of its decision was not discussed by counsel representing either of the parties, and was given no attention whatever by appellee, for the obvious reason that appellant in its brief made no such contention, but on the contrary, expressly and in appropriate language admitted that because of the silence of the acceptance agreement upon this subject, parol evidence was admissible to prove what foreign drafts were under the acceptance agreement; that is, whether, as claimed by it, all of the drafts, or whether, as asserted by appellee, only the so-called short term drafts had been so deposited. That the statement just made by appellee is neither extravagant or fanciful can be readily ascertained from an examination of appellant's brief, where at page 109 the following is made:

> "These cases (referring to cases cited by appellee) merely hold that where a contract is on its face incomplete, extrinsic evidence of extemporaneous parol agreements may be introduced. They were cited by the court in support of its conclusion *that since the acceptance agreement is blank as to the drafts deposited thereunder, parol evidence was admissible to prove which drafts were, and which were not so deposited.* **There can be no question about the correctness of this ruling.**"

An examination of appellant's brief will disclose that its argument was that in the *conversations* occurring between Hall and Pope representing Richfield,

and Gilstrap and its other officials representing appellant, it was definitely understood that **drafts** should be deemed as security for the acceptances. Statements to this effect are so frequently repeated in appellant's brief that their reproduction would occupy many pages of this petition. For instance, in stating the issues herein involved, it is said by appellant:

> "There cannot possibly be other issues than these:
>
> (1) Were the drafts, the proceeds of which are the subject of this litigation, deposited under the acceptance agreement? * * * If they were, the second question is no longer in issue. * * *" (p. 11.)

In the statement of its position appellant states:

> "Although appellant refused to advance to Richfield by means of acceptances or otherwise *a sum in excess of the amount of certain sight or short term drafts, appellant's contention is that* **all drafts** *were nevertheless deposited as security for acceptances issued and to be issued,* and consequently were deposited under and pursuant to the acceptance agreements." (p. 12.)

Still further, appellant states:

> "If, in spite of the overwhelming evidence of **conversations, acts and records** of both Richfield Oil Company and appellant in support of the contention that the *drafts in dispute were deposited under the acceptance agreement* it should be determined that *they were not so deposited, then admittedly, they were at least deposited for collection.* * * *" (p. 13.)

Later on in its discussion under the title "**all the drafts in litigation were deposited by Richfield with appellant under and subject to the acceptance agreements, pursuant to the security for the general indebtedness of Richfield to it**" is found the statement:

> "The question presented by this phase of the case can be answered only from necessary and proper inferences *to be drawn from the facts and circumstances* **for the record is barren of any express agreement between Richfield Oil Company and appellant** *stating whether the drafts in question were or were not to be placed under acceptance agreements.*" (p. 19.)

And still further along in its brief, appellant states:

> "It is the contention of appellant that every draft deposited with it during the period commencing with October 8, 1930, and ending on January 15, 1931, was deposited as security under acceptances and consequently under the acceptance agreement." (p. 27.)

And in arguing why it was understood that the long term drafts as well as the short term drafts were placed under the agreement, appellant asserts:

> "Furthermore, just because the acceptances were actually paid as they matured from the proceeds of drafts is not evidence that appellant had any guaranty at the inception of these transactions that such would be the case. Conceivably, a great number of the drawees of the drafts might default, failing to pay entirely, or delaying payment for such a period of time that the acceptances would still be unsatisfied at the maturity of the 180 day drafts. In any such event,

these drafts would have had actual value as security. These *probabilities* were sufficient to necessitate the deposit of all drafts as security for all acceptances, and they *completely explain the statement of Mr. Lipman and Mr. Hall* (hereinbefore quoted) that appellant would be willing to advance money on *Richfield's foreign drafts.*

It is submitted that the foregoing arguments demonstrate that a *real and substantial* reason existed for the deposit and acceptance of all the drafts in question as security for all the acceptances. * * *'' (p. 52.)

These quotations from appellant's brief must satisfy this court that appellant's position was, *first,* that because of the silence of the acceptance agreement upon the subject, parol evidence was admissible to identify and define the character of the securities by which the acceptance agreement and acceptances were supported; and, *second,* that upon all of the parol evidence introduced, including the *negotiations* and *declarations* of the parties, as well as the *correspondence* of appellant, it was proved that all of the drafts and not, as contended by appellee and found by the lower court, only the short term drafts were deposited as such security. In view of these concessions and arguments on the part of appellant, it was but natural that appellee should fail to anticipate the position taken by this court that the only parol evidence that was entitled to consideration was the "delivery of the bills of lading". That no such discussion was engaged in is clearly shown by reference to page 105 of appellee's brief where, under the title

"the acceptance agreements being silent respecting the securities to which they relate, parol evidence was admissible for the purpose of identifying said securities and also to establish the agreement relating to the remaining drafts" it is said:

> "Imputing legal stability to these agreements, notwithstanding such silence, it must be apparent *that parol evidence was admissible for the purpose of identifying the securities to which the agreement related and upon which* its provisions would *become fastened.* This must necessarily be so because in the absence of such parol evidence the agreements themselves would be entirely innocuous and of no materiality in this controversy. While in the court below this legal proposition was disputed, or at least not conceded, appellant here admits that the rule is as stated because in its brief it is stated: * * *" (Italics ours.)

Then follows quotation from appellant's brief at page 109, hereinabove noted.

With great respect, but with equal earnestness, appellee insists that he is entitled to a rehearing of this important controversy for this reason alone. He ought not to be deprived of a judgment to which in good faith he believes he is entitled without being accorded the opportunity of discussing upon its merits the legal proposition here given consideration.

II.

THE DETERMINATION BY THIS COURT THAT PAROL EVIDENCE WAS INADMISSIBLE TO ESTABLISH THAT THE SUBJECT MATTER OF THE ACCEPTANCE AGREEMENT DATED OCTOBER 4, 1930, AND THE CONSIDERATION FOR THE ACCEPTANCES RELEASED THEREUNDER CONSISTED SOLELY OF FOREIGN DRAFTS, AND THE CHARACTER OF SUCH DRAFTS, IS IN CONFLICT WITH THE THEORY UPON WHICH THE TRIAL WAS CONDUCTED BY BOTH PARTIES, WITH THE ADMISSIONS OF APPELLANT, INVOLVES A MISCONCEPTION OF THE WRITTEN EVIDENCE UPON WHICH SUCH DETERMINATION WAS REACHED AND LACKS JUSTIFICATION IN THE RECORD.

The bank in its brief concedes that the acceptance agreement does not identify the securities, by which it is to be supported, and that resort to parol evidence was necessary to identify such securities. In its argument it claimed that the parol evidence introduced establishes that the long, as well as the short, term drafts were deposited as such security. This situation is given recognition by the court in its opinion, where it states:

> "It is agreed that the acceptance agreement, although in writing, does not sufficiently identify the documents or security which is the subject-matter of the contract between the parties **without the consideration of parol evidence.**" (p. 7.)

Notwithstanding this concession, this court later states:

> "The security given to the bank for such acceptance is not indicated by the written acceptance agreement alone, other than by the word 'merchandise' and 'goods'. But the delivery of the bills of lading clearly identifies such goods.
> * * *

A consideration of the writings exchanged without the aid of any oral evidence other than the fact of delivery of such documents shows that the security of the bank for its liability under its acceptance of the drafts presented to it was to be merchandise in transit on board the 'Silver Hazel' and 'Silver Ray' which was described in the acceptance agreement as 'merchandise' and also as 'goods' and that in order to effect the pledge of this cargo the Richfield Oil Company *transferred its bills of lading thereof, properly assigned, to the bank,* together with foreign bills of exchange drawn upon the purchaser of the goods represented by the bills of lading which would enable the bank to realize upon the value thereof by receiving from the purchaser the price thereof." (p. 7.)

* * * * * * *

"It is clear that during the voyage, by reason of the possession of the bills of lading, and under the terms of the acceptance agreement the bank was secured by the entire value of the cargo. The transaction between the parties was evidenced with clarity and definiteness by the written acceptance agreement, by the written documents accompanying the agreement, by the written acceptance endorsed by the bank, and by the letters exchanged and by the credit realized to the Richfield Oil Company upon nine drafts presented to the bank for acceptance and *needed no additional parol evidence* to identify the subject matter of the contract and establish its terms." (p. 8.)

In reaching this conclusion just quoted, it is obvious that the court inadvertently failed to appreciate that, while the acceptance agreement signed by Rich-

field was the usual form of acceptance agreement utilized by appellant in transactions, to which such form was applicable, it was not the form of agreement which was adaptable or should have been used to reflect the agreement actually negotiated by the parties.

It also inadvertently failed to give consideration to the uncontroverted evidence that the officials of Richfield, participating in the negotiations, were entirely unfamiliar with acceptances and acceptance agreements and their mechanism, as well as the conceded fact that the blank space reserved in the acceptance agreement for the description of the securities to be utilized was intentionally left blank, because at the time of its execution and delivery, the parties did not know what drafts were to be deposited, and likewise because it was intended from time to time to deposit additional drafts thereunder.

That there is no conflict whatever in the record with respect to these matters can quickly be shown.

The error into which this court has unconsciously crept is readily traceable to a misconception of that portion of the acceptance agreement reserved for a description of the securities by which it is to be supported and the court's omission to give effect to the evidence showing that a *"form of acceptance"* was used which was not at all adaptable to the transaction which was negotiated and consummated. This misconception is undoubtedly due to the circumstance that appellee failed to present this phase of the controversy in its fullness due to appellant's admission that

"drafts" constituted the security for the execution and release of the acceptances.

To uphold the determination reached by the court with respect to the point under consideration would be to substitute an agreement not contemplated by the parties for one intended by them and into which they actually entered. That the statement just made is in accord with the evidence will quickly be demonstrated by us.

That part of the acceptance agreement which is herein involved reads as follows:

> "To Wells Fargo Bank & Union Trust Co.—San Francisco.
>
> Dear Sirs:
>
> We hand you herewith, for acceptance, the following drafts:
>
> | Number | Date | Covering following merchandise | Amount |
> |---|---|---|---|
> | | Oct. 6 | | $150,000 |
>
> Marks Numbers Description
>
> .....
> .....
> .....
> .....
>
> Payable in San Francisco to the order of ourselves"

The proposed agreement was a printed form. It will be observed that although executed the only insertions were "Oct. 6" under the word "Date" and "$150,000" under the word "Amount". These insertions refer to the drafts drawn by Richfield on itself

delivered to the bank for acceptance. The agreement, however, is entirely silent with respect to the security for such acceptances. *Nowhere are bills of lading referred to,* nowhere are even the drafts drawn upon the consignees named in the bills of lading, mentioned. This circumstance of itself is both persuasive and significant. It tends strongly to establish that the transaction was not the one usually engaged in involving the financing of shipments through acceptances, the payment of which was secured by the shipping documents including the bills of lading and the drafts drawn in connection therewith.

Inasmuch as no *"goods"* or *"merchandise"* is referred to or described therein, no ground existed for holding as against the evidence introduced by both parties as well as the finding of the lower court, that the "bills of lading" were deposited as such security; and if by parol the appellant could establish (which it did not do) that the bills of lading, as well as the drafts, were deposited as such security, why appellee could not, by the same character of evidence, establish that one or more drafts were agreed upon as security and not the bills of lading or all of the drafts, is, we submit, incomprehensible to us. It would seem that the mere statement of this proposition demonstrates its own integrity.

But, aside from the silence of the acceptance agreement just alluded to, a resort to the testimony will prove conclusively:

(a) That the printed acceptance agreement was a *mere printed form* used to subserve the

convenience of the parties and was not the form of agreement adaptable to the transaction being consummated;

(b) That the officials of Richfield were ignorant of the use of acceptances and their mechanics;

(c) That both parties recognized and conceded that drafts, and drafts alone, constituted such security;

(d) That the evidence of both parties established that drafts, and drafts alone, were to be the subject-matter of such agreement;

(e) That the bills of lading, as stated in the opinion, *were never assigned to appellant,* but were delivered to it as appellant's representative to be delivered to the consignee upon the acceptance of the drafts which were intended and agreed should alone be such security; and

(f) That the so-called "Lyons' letter" was written by an official of Richfield having no knowledge whatever of the details of the transaction; that it was not acted or relied upon by appellant and that no comparable letter ever accompanied any of the other drafts or bills of lading delivered to appellant.

(a) The printed acceptance agreement was a mere form used to subserve the convenience of the parties and was not the form of agreement adaptable to the transaction being consummated.

This subject-matter is given recognition in the opinion of this court in the following language:

> "This acceptance agreement was upon the **form** used by the bank and most of the provisions therein *were no doubt printed.*" (p. 7.)

The fact is, as an examination of the original acceptance agreement will disclose, that the entire acceptance agreement (with the exception of the signature of the party and the insertion of "October 6th—$150,000") is printed, and excepting as to such insertion none of the blanks therein set forth were filled in.

W. J. Gilstrap, assistant manager of the Foreign Department of appellant bank, who, on its behalf negotiated the agreement, upon this subject testified:

> "This acceptance agreement contemplates a description of the drafts presented to the bank for acceptance. Nothing was filled in on the agreement. The agreement also contemplates that where documents are turned over to the bank as security for acceptances the documents themselves should be identified on the face of the agreement. The agreement contemplates on its face that the bank shall have in its possession, at the time the agreement was signed and at the time the drafts were accepted and released, the documents or the the security, **which securities shall be designated upon the face of the agreement.** * * *" (R. p. 403.)

Emphasizing the reason why the securities were not inserted in the acceptance agreement, Gilstrap further testified:

> "* * * that the acceptance agreement did not stipulate the exact amount of acceptance, that is the exact amount for which each acceptance was drawn, because we did not know, nor did they know, nor did anyone know, in what amount the acceptances would be issued and when they would be issued. That would be dependent upon the collections which later would be forwarded to us. Likewise, no mention could be made, as I told Mr. Pope, of the collections which were the security for this particular credit, because for the same reason neither they nor we knew exactly what collections would later be sent us. Rather than have them have to execute a new acceptance agreement each time that a new agreement was asked for or each time that they sent us a new collection, I explained to Mr. Pope that this one agreement was expected to be a blanket one." (R. pp. 371-2.)

And shortly thereafter he further testified:

> "I also explained to Mr. Pope that if for any reason the proceeds of the bills that may be deposited with us were not received by us in time to meet any maturing acceptances the deficiency that the Richfield Oil Company might have to make good might be in part or in whole obtained by renewal acceptances *either against bills which were originally put in as security for the original acceptances, or against new bills which might later have been deposited;* in other words, on renewal acceptances against some bills against which the first 90 day acceptances were issued,

or as against any later bills that might have been deposited. * * *'' (R. pp. 373-4.)

Mr. Homer E. Pope, one of the officials of Richfield who participated in the negotiations upon this subject, testified:

''The first time I saw this acceptance agreement (Plff's. Ex. 16) was a few days before we came up to San Francisco. I did not discuss its contents with anyone. I did not make any inquiry as to why there were blanks in the agreement. I believe that subject came up during our conversation with Mr. Gilstrap. To the best of my memory I believe something of this nature was said by Mr. Gilstrap, 'As you will be depositing acceptances from time to time under this arrangement and **drafts** under this arrangement, all of which you can not identify now, it is impossible to fill in those blanks at the present time.' We could not give by number and reference on October 6th or 7th **drafts** that we would deposit on October 10th or 12th. But none the less it might be that drafts of October 10th or 12th were intended to apply under the agreement.

As I remember it, something was said to the effect that reference to specific **drafts** was left blank in the acceptance agreement in order to provide for the deposit of **drafts** in the future thereunder, the numbers and description of which were at the time of the execution of the agreement unknown. I don't remember anything having been said to the effect that the reason for the blanks in the agreement was to avoid the necessity of a new acceptance agreement every time an acceptance was issued against certain **drafts.**'' (R. pp. 313-4.)

That the transaction was not the normal acceptance transaction involving foreign commerce is likewise shown by the evidence given by Gilstrap upon cross-examination with respect to the "Acceptance Register" kept by appellant, his testimony being

> "There is nothing in this acceptance register indicating the character of the security that was located under the acceptances or under the acceptance agreement." (R. pp. 393-4.)

(b) The officials of Richfield were ignorant of the use of acceptances and their mechanics.

Prior to the transactions here being considered, none of the foreign business engaged in by Richfield had been based upon acceptances. The procedure involving the use of acceptances as well as acceptance agreements, was something with which the officials of Richfield having its foreign business in charge were entirely unfamiliar. That such lack of familiarity was known to appellant is shown in its brief in which it states:

> "Prior to this time Pope, who testified at the trial of this action, was ignorant of the mechanics of an acceptance credit. His visit was solely for educational purposes so that he would be in a position to introduce into the office of Richfield the proper method of handling this method of deposit drafts for collection." (Def's. Br. p. 22.)

That Hall was likewise unfamiliar with acceptances is shown by the testimony of Gilstrap wherein he states:

> "I suggested to Mr. Hall that if the business was an extension of credit it might be more

> economically handled, from Richfield's point of view, by means of bank acceptances rather than by a direct discounting of foreign collections. I am positive that I suggested that to Mr. Hall and that Mr. Hall did not suggest it to me." (R. p. 369.)

And further,

> "On October 6th Mr. Hall, accompanied by Mr. Pope, came to my desk. Mr. Hall told me that Mr. Pope had been sent to educate himself with every detail of the acceptance business; that it was entirely new to him *as it was also to the Richfield Oil Company,* and they wanted Mr. Pope to familiarize himself with every detail of it so that he could handle their end of the arrangement." (R. p. 371.)

This evidence is corroborated by the evidence of Pope (R. pp. 261-2) and Smile Luenberger (R. p. 430.)

(c) Both parties recognized and conceded that drafts, and drafts alone, constituted such security.

It would be impossible within the confines of a petition for rehearing to here reproduce the evidence upon this subject. We will content ourselves, however, with some of the many references upon this subject contained in appellant's brief, to some of the evidence introduced during the trial elicited from witnesses called by appellant bank and to references to appellee's brief wherein it is contended that the evidence sustains the finding of the lower court that only short term drafts were deposited under the acceptances.

(1) References to appellant's brief.

In its preliminary statement of the facts, appellant, in describing the mechanics of the acceptance transaction, states:

> "The mechanics of the acceptance method differ from those involved in the ordinary draft collection transaction in that the customer bank first executes an acceptance agreement which specifies a sum up to which the customer may draw upon the bank by means of acceptances based *upon drafts deposited for collection*. Thereafter, when the customer deposits drafts for collection he draws acceptances (drafts) on the bank in the amount agreed upon **based upon the drafts.** * * * When the acceptances mature according to their terms the bank pays the holders thereof *and reimburses itself from the proceeds of the drafts which have been deposited as aforesaid.* * * * **Such an acceptance agreement in favor of appellant was executed by Richfield Oil Company.** * * *" (App's. Br. pp. 2-3.)

In its statement of the issues, appellant states:

> "There cannot possibly be other issues than these:
>
> (1) Were the **drafts** the proceeds of which are the subject of this litigation, deposited under the acceptance agreement and therefore subject to the provisions hereinbefore quoted therefrom?" (App's. Br. p. 11.)

In stating its position the bank uses the following language:

> "Although appellant refused to advance to Richfield, by means of acceptances or otherwise,

> a sum in excess of the amount of certain sight or short term drafts, appellant's contention is that **all drafts were nevertheless deposited as security for the acceptances issued and to be issued** and consequently were deposited under and pursuant to the acceptance agreements. These agreements constituted a contract between Richfield Oil Company and appellant, under the express terms of which appellant was entitled to **hold all drafts and the proceeds thereof deposited under the acceptance agreements** * * *"

And again:

> "If in spite of the overwhelming evidence of conversations, acts and records *of both Richfield Oil Company and appellant in support of the contention* **that the drafts in dispute were deposited under the acceptance agreement,** *it should be determined that they were not so deposited, then admittedly, they were at least deposited for collection.* * * *" (App's. Br. p. 13.)

Under the title "**All the Drafts in Litigation were Deposited by Richfield with Appellant Under and Subject to the Acceptance Agreement Pursuant to the Terms of Which Appellant Held the Drafts as Security for the General Indebtedness of Richfield to it**" will be found the statement:

> "The question presented by this phase of the case can be answered only from necessary and proper inferences to be drawn **from the facts and circumstances, for the record is barren of any express agreement between Richfield Oil Company and appellant stating whether the**

drafts in question were or were not to be placed under acceptance agreements." (App's. Br. p. 19.)

Still later in its brief it is said:

"It is the contention of appellant that every draft deposited with it during the period commencing October 8, 1930, and ending on January 15, 1931, was deposited as security for acceptances and consequently under the acceptance agreement.

That this was the understanding of the officers of appellant and that this understanding was communicated to Hall at the inception of these transactions is conclusively shown by the testimony of both Mr. Lipman and Mr. Hellman corroborated by Mr. Hall." (App's. Br. p. 27.)

And after quoting the evidence of the witnesses referred to appellant, commenting upon its effect, argues:

"In all of this testimony of witnesses on both sides, a line of credit based on **foreign drafts** was referred to." (App's. Br. p. 28.)

And, as illustrating the extent to which appellant was willing to go in order to substantiate its claim that the *drafts* constituted such security, it further argues:

"At the time of the delivery of the first acceptance agreement on October 6, 1930, Richfield Oil Company and appellant contemplated not one transaction, but a continuous deposit of drafts and issuance of acceptances during an indefinite period of time, the limits of which were then

unknown but, as far as could be ascertained, might well be for one, two or several years." (App's. Br. p. 44.)

"With a continuous series of deposits of drafts and issuance of acceptances under one agreement contemplated by the parties to extend over a period of time probably far beyond the date of the maturity of the 180 day drafts, the supposed impossibility of using these drafts as security for acceptances becomes non-existent. On the contrary, the 180 day drafts on Brila Bros. stood as effective and useful security for any acceptances or other obligations permitted or provided for by the acceptance agreement. * * *" (App's. Br. p. 44.)

And commenting upon the blank spaces found in the acceptance agreement, appellant states:

"Each of the acceptance agreements is **blank** as to the drafts and securities which were to be deposited thereunder. Parol evidence was therefore admissible to prove what drafts were so deposited. There is no dispute with regard to this. The very existence of these blanks, however, is mute evidence of the soundness of appellant's contention that a revolving credit was intended, for such an arrangement caused it to be impracticable and impossible to list the drafts deposited or to be deposited under the acceptance agreement." (App's. Br. p. 45.)

In commenting upon the court's findings appellant states:

"Contrary to the court's findings, no distinction was ever made or intended to be made; **all**

> drafts were deposited as security for acceptances, and all were under and part of the transaction which commenced with the delivery of the acceptance agreement on October 6, 1930." (App's. Br. p. 55.)

Its conclusion upon this subject is quite illuminating, its statement being:

> "There was only one transaction inaugurated by and under the acceptance agreement. **All drafts transmitted by appellant to Richfield Oil Company were deposited under the agreement as security for the acceptances; being thus deposited they became by operation of the terms of the agreement security for the general indebtedness of Richfield to appellant.**" (App's. Br. p. 65.)

Without further quoting from appellant's brief we direct the court's attention to the following pages upon which comparable statements appear. (pp. 47, 51, 52, 53, 54, 58, 60, 62.)

These quotations from and references to the argument of appellant in the brief filed by its learned counsel should themselves convince the court that drafts alone, whether short term or long term, or both, constituted the security for the acceptances.

(2) Appellant's evidence itself establishes that the drafts alone constituted the subject-matter of the agreement.

Frederick L. Lipman, president of appellant, in testifying to the conversation occurring between himself and Hall, said:

> "This representative, Mr. Hall, stated that there had been some prior discussion as to this line of business, *and I think I said something to the effect that if these* drafts *were good security, that is, if they were drawn on people we had confidence in,* we would regard those as collateral for an acceptance credit. This representative assured me that the drafts were quite all right. * * * I cannot make a credit for the bank without putting a figure on it. I suggested that the credit might be $150,000 or $250,000. We could not lay much stress between one sum or another *because it was to be governed by these drafts.*" (R. p. 449.)

Frederick J. Hellman, a vice-president of appellant, and in charge of its foreign department, upon the same subject, testified:

> "To the best of my recollection I told Mr. Hall that I thought that we, meaning the Wells Fargo Bank, would be willing to go into such a transaction *advancing them on their collections,* and that I could see nothing that would stop us from doing it, and as long as they had other lines in the bank I would rather consult with Lipman first." (R. p. 436.)

With respect to the conversation with Mr. Lipman he further testified:

> "We went into Mr. Lipman's office and I said to Mr. Lipman that Mr. Hall was representing the Richfield Oil Company; that he was the manager of their export department, and that they had not been very well satisfied down in Los Angeles, and that he had been discussing ad-

> vancing funds **on their collections** in the form of an acceptance arrangement. * * * Mr. Hall told Mr. Lipman * * * that all their collections, or practically all of their collections, were paid without any trouble. Mr. Lipman said he thought it would be all right to open the acceptance credit but he wanted it understood that before we made any advance on their collections we would be able to check up through our foreign correspondents on their foreign customers. * * * Then the question came up of the amount of credit. I believe Mr. Lipman said to Mr. Hall, 'We will advance you $150,000, $200,000, $250,000 **on your foreign collections'**. He said to Mr. Hall that this credit was to remain in force until it was cancelled by either side; that we did not know whether it would work out or not; we did not know what kind of foreign collections they were handling and if it did not work out we reserved the right to cancel the credit. (R. pp. 436-439.)

The evidence of W. J. Gilstrap, assistant manager of the Foreign Department of appellant bank, who negotiated the acceptance agreement with Hall and Pope, clearly shows that "drafts" were to constitute the security for the acceptances. Upon this subject, in detailing his conversation with Hall and Pope on October 6, 1930, he testified:

> "I told him (Pope) * * * that the acceptance agreement did not stipulate the exact amount of acceptance; that is the exact amount for which each acceptance was drawn, because we did not know, nor did they know, nor did anyone know in what amount the acceptances would be issued

> and when they would be issued. *That would be dependent upon the collections which later would be forwarded to us.* Likewise no mention could be made, as I told Mr. Pope, **of the collections which were the security for this particular credit, because for the same reason neither they nor we knew exactly what collections would later be sent us.** * * * I also explained to Mr. Pope that if for any reason *the proceeds of the bills that might be deposited with us* were not received by us and in time to meet any maturing acceptances the deficiency that the Richfield Oil Company might have to make good might be in part or in whole obtained by renewal acceptances **either against bills which were originally put in as security for original acceptances or against new bills which might later have been deposited;** in other words, **on renewal acceptances against some of the bills against which the first ninety day acceptances were issued or as against any later bills that might have been deposited.** (R. pp. 371-374.)

(3) Appellee's contention.

While appellee contended that drafts were to constitute the security for the acceptances, his position was that under the agreement reached by the parties the short term drafts alone should constitute such security, the long term drafts being deposited merely for collection. This phase of the argument is given exhaustive attention in the brief filed by appellee (pp. 25 to 45), to which we respectfully refer the court.

(d) Bills of lading delivered to appellant merely as agent of appellee for delivery to consignee upon acceptance of drafts.

In its opinion this court, in referring to the bills of lading deposited with appellant, states:

> "In order to effect the pledge of its cargo the Richfield Oil Company transferred its bills of lading therefore, **properly assigned, to the bank,** together with foreign bills of exchange drawn upon the purchaser of the goods represented by the bills of lading which would enable the bank to realize upon the value thereof upon receiving from the purchaser the price thereof."

This statement, in so far as it relates to the bills of lading is inadvertently inaccurate. *None of the bills of lading were assigned by the Richfield Company to the bank.* It is the contention of appellee that they were delivered to the bank as the agent of Richfield merely for transmission to its correspondent to be delivered upon the acceptance of the drafts, one of which, to-wit, the sight draft, being the security under the acceptances. The documents in question, including the bills of lading, and the drafts were delivered to appellant bank on October 8, 1930, by Mr. Hall, each set of documents accompanied by a letter addressed to appellant couched in the following language:

> "We are enclosing the following documents covering shipments going forward to Calcutta and Bombay per the (name of steamer)."

After describing the documents the letter proceeded:

> "provided these documents are found to be in order *please forward them to your correspondent bank for collection* requesting them to notify you immediately by way of non-acceptance or non-payment of draft at maturity." (R. pp. 266-269.)

The record is absolutely barren of a suggestion that any of the bills of lading were assigned to appellant. Proof of any such assignment, if made, would necessarily have been produced by appellant. The letters accompanying the documents themselves negative any such inference. Upon delivery of the documents referred to in each letter a receipt was issued by the bank to Richfield covering the drafts alone, which receipts were introduced in evidence. These receipts are not reproduced in the record but their introduction is shown. (p. 271.)

While in the absence of any contrary showing, in view of the judgment of the lower court appellee is entitled to the inference that each receipt conformed to the communication, as a matter of fact, which appellant will undoubtedly concede, each of these receipts is in the following form:

> "We have received *for collection* your items as listed below." (Italics ours.)

It will thus be seen that the trial judge was impelled to construe this transaction and was justified in holding that the evidence showed that appellant acted as the agent of Richfield in transmitting the drafts to its correspondent for *collection* and that they transmitted the bills of lading to be delivered upon the

acceptance of the drafts thus transmitted. Furthermore, there is nothing in any of this evidence tending to prove that the bills of lading were delivered as security for the acceptances.

(e) The so-called Lyons' letter (Defs. Ex. A) is lacking in evidentiary or controlling value.

The so-called Lyons' letter of October 8, 1930, by Richfield's controller is not controlling, is subject to explanation and was fully explained by attendant circumstances. It reads as follows:

> "We are sending by Mr. Hall documents covering a shipment to Birla Bros., Ltd. at Calcutta, India. Will you please release against this shipment $115,000 worth of acceptances made payable at 90 days sight."

The evidence discloses that the writer of this communication was entirely lacking in information respecting the transaction and that in writing such letter he assumed, without having any knowledge upon the subject, that the transaction was shaped as stated. The letter was entirely unnecessary. The acceptance agreement and acceptance to be released had already been delivered to the bank. Hall had in his possession for delivery the documents (including the drafts) accompanied by appropriate communications. The acceptances would have been delivered to him in conformity with the agreement without the communication from Lyons. Such communication could not avoid the agreement already negotiated upon the strength

and in reliance of which the acceptance agreement and acceptances had been and the documents and accompanying communications were to be delivered. The transaction in question was negotiated exclusively by Hall and Pope. Lyons at no time participated therein. At this time Richfield was in dire financial distress and it was essential that funds be obtained at the earliest possible moment. On the evening of October 6th Hall and Pope returned to Los Angeles. On the evening of the following day Hall left Los Angeles for San Francisco bringing with him, among other things, the four Birla Bros. drafts together with two transmittal letters. Ordinarily these letters, with the drafts and documents referred to therein, would have been transmitted to appellant by mail. If such had been the procedure the Lyons' letter would not have been written. Hall came to San Francisco not because it was necessary that the transmittal letters, drafts and documents should be personally delivered, but to enable him to forthwith obtain the $115,000 in order that it could be utilized in Los Angeles before the night of that day. (R. pp. 347-8.) To permit such use, upon the net proceeds of the acceptance being credited to the account of Richfield the deposit slip was telephoted to Los Angeles. Lyons was interested in getting the $115,000 quickly and the letter was written by him with this object alone in view. The details of the transaction had already been agreed upon. The letter did not undertake to restate such details or to modify or restrict them in any manner, nor did it undertake to change, modify or alter

the agreement already made. It was the character and type of letter that any one under like circumstances would have written, the writer never imagining that it would subsequently be characterized as illustrative of the agreement existing between the parties. It could not act as a substitute for the negotiations previously conducted by the parties as well as the agreement entered into between them definitely fixing their rights and obligations.

That the appellant itself attached no importance to the letter is evidenced by the circumstance that its contents were never discussed by the officials of the bank with any of the representatives of Richfield. A conclusive reason why this communication is utterly lacking as an important element in this case is that while it refers to "shipment" the evidence of all the witnesses, including Gilstrap, proves conclusively that the agreement related to drafts and nothing else.

That the Lyons' letter is of no importance and that his understanding was exactly in accord with that testified to by Hall and Pope and that he understood that only short term drafts were being deposited as security under the acceptances, the balance being sent to the bank for collection, is conclusively proven by the correspondence dictated by Pope but read and signed by Lyons, the first written six days after the letter (Def. Ex. A) and the second less than two weeks thereafter. The first letter written by Lyons to appellant after the transmission of Defendant's Exhibit A was dated October 13, 1930, and read as follows:

"Our records show that we have in your good bank a draft reserve for $9,734.16 against which no acceptances have been issued.

If this information is correct please issue one of the drafts which you now hold for $5,000 payable in 90 days.

Thanking you for your courtesy in this matter." (Plff. Ex. 28.)

This letter demonstrates that Lyons' understanding was not only that drafts, but that certain specified drafts, had been deposited as security for the payment of the acceptances issued. No other construction can be given to the letter. His subsequent letter of October 20th, which was written while Mr. Gilstrap was in Los Angeles and after he had conferred with the officials of Richfield (R. p. 394) confirms the statements just made. In this letter, because of the absence of Gilstrap, addressed to Mr. Leuenberger, Lyons states:

"In talking with Mr. Gilstrap Saturday he informed us that we might use our collection No. 103010 as No. 46843 on La Paz, Bolivia, as reserve against acceptances. Under these acceptances would you please issue an acceptance for $10,000 to mature in 90 days? * * *" (Plff. Ex. 30.)

These two letters were dictated by Pope and signed by Lyons immediately following the institution of the transactions involved when the parties had clearly in mind the details of the agreement made and long before any dispute or controversy arose over the sub-

ject of the agreement, or what drafts were deposited under the acceptance agreement.

With these two letters before us, regardless of all other testimony upon the subject, the lack of importance of the Lyons letter becomes obvious.

We believe that the foregoing must convince this court that its determination of this branch of the case was unwarranted. There is, however, a legal proposition involved to which we desire to invite its attention. If, as determined by this court, and as admitted by appellant, parol evidence was admissible to identify the securities which the parties agreed should support the acceptance agreement and the release and delivery of the "acceptances", what possible legal justification can exist for the court to hold that only certain of such parol evidence should be given consideration and that all remaining evidence—although admissible—was lacking in legal force or stability?

If, as contended by appellee, the agreement between the parties was that certain drafts, and none others, were agreed to constitute such security, how can such agreement, if established, be nullified merely because in order to obtain the acceptance of such drafts it was essential to deliver to appellant possession of the bills of lading so that they in turn could be delivered to the consignee upon the acceptance by such consignee of one or more of the drafts which, or the proceeds of which, according to the agreement, were to be held by appellant as security for the acceptances?

If appellant bank agreed to act as the agent of Richfield in obtaining the acceptance of certain drafts drawn by Richfield on its foreign customers, and for such purpose obtained possession of certain bills of lading to be delivered by it to the consignee upon acceptance of the drafts, and likewise agreed with Richfield that upon the delivery to it of the drafts to be thereafter accepted, together with bills of lading, it would execute and release certain acceptances upon the understanding that the drafts or certain of the drafts thus drawn upon Richfield's foreign customers was to constitute the security for such acceptances, such transaction would unquestionably be free from legal objection. It would be an agreement which the parties had a legal right to enter into. It would be an enforceable agreement if established. It would be an agreement which could be established by parol, if not evidenced by a writing. In the instant case it is claimed by appellee that such an agreement was in fact entered into between Richfield and appellant bank and that inasmuch as the acceptance agreement failed to specify the security to which it referred, the character and identity of such security could be properly established by parol.

If, by parol evidence, it could be proved that the bills of lading constituted such security, it is inconceivable why by the same character of evidence it could not be proved that the drafts, or some of them, were agreed to constitute such security in lieu of the bills of lading.

In the case under consideration the appellant, conceding the admissibility of parol evidence, offered testimony in support of its claim that both drafts, to be accepted upon delivery of the bills of lading, constituted the security for the acceptances issued by it. On the other hand, appellee claimed that only the short term drafts were agreed to constitute such security. Both parties, however, agreed that drafts, and not the bills of lading, constituted such security. The dispute between them was not whether drafts constituted such security, but whether *all* or only a *certain portion* of these drafts were thus deposited.

Having conceded the admissibility of such parol evidence, the court should not have laid down the rule that only a part of such parol evidence can be considered and that all of the other evidence upon the subject must be rejected.

We submit that there is no justification for any such legal declaration.

III.

IT IS DEFINITELY PROVED THAT ALL FOREIGN COLLECTIONS SHOULD BE DEEMED TO BE SEPARATE AND APART FROM OTHER BUSINESS OF RICHFIELD WITH AND ITS FINANCIAL OBLIGATIONS TO APPELLANT BANK.

With respect to the proposition above entitled, this court in its opinion states:

> "The appellee contends that the agreement of the bank, as testified to by Hall and Pope, to

keep the account of the foreign business separate was in effect a waiver of the banker's lien. This arrangement was made according to the testimony of Hall and Pope as a matter of convenience because of Hall's agreement with Richfield Oil Company concerning commissions. Nothing was said at the time of the agreement to keep the accounts separate about the banker's lien and as we have already pointed out, the express written agreement was that the proceeds of the bills of exchange deposited under the acceptance agreement should be available to apply to any indebtedness due from the Richfield Oil Company to the bank. This arrangement, instead of being a waiver of the banker's lien, was an assertion of a lien as to all collections covered by the acceptance agreement. In the general agreement or arrangement testified to by Hall to keep the foreign accounts separate from the other accounts of the Richfield Oil Company there was no distinction between the bills of exchange which matured in less than ninety days and those which matured in more than ninety days, although he testified that the former were and the latter were not to be used as a basis for acceptances after the expiration of ninety days. According to Hall the agreement was that the foreign exchange business should be kept separate, not that there should be two separate accounts in the foreign exchange department, one on a short term and the other on long term bills of exchange. The two types of bills of exchange were separated in their dealings solely because of the refusal of the bank to issue acceptances upon bills of exchange which were not payable within ninety days. There was no contract, express or implied,

> to treat the two types of bills of exchange differently with relation to the banker's lien unless it can be said that the express assertion of the lien as to the bills of exchange included in the acceptance agreement was an implied waiver of the lien as to those not included. * * * A mere separation of the deposit accounts in a bank as a matter of convenience would not operate as a waiver of the banker's lien, particularly where there was no agreement or understanding as to the disposition of the account."

We respectfully, but with confidence, submit that this portion of the court's decision is based upon a misconception of the evidence with respect to the so-called Hall agreement, and a misunderstanding of appellee's position with respect to the application of the so-called Hall agreement to the two types of draft. Such misconception illustrates the wisdom of the rule in favor of the presumption attaching to the trial court's findings. To subserve the convenience of the court and ourselves we will deal with these two propositions in their inverse order.

(a) Appellee does not claim that any distinction was made between the two types of drafts in the so-called Hall-Pope agreement.

Appellee's claim that the Hall-Pope agreement to which reference will hereafter be made, absolved from appellant banker's lien the proceeds of the long term drafts, was not based upon the assumption that any such distinction was either discussed or reached with respect to the application of the agree-

ment to keep the foreign business entirely separate and apart from Richfield's other business and affairs with the appellant bank. This agreement, as testified to and as proved, related to and embraced *all* of Richfield's foreign business with appellant bank. The reason why this latter agreement was not enforceable as against the short term drafts, or their proceeds, was solely because of the other agreement that these short term drafts and their proceeds should constitute the security for the acceptance agreement and the acceptances released thereunder. The moment that the short term drafts came under the acceptance agreement, it of course was realized that they and their proceeds became subject to its terms. One of its terms was that the security actually deposited under the acceptance agreement

> "shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted." (R. p. 253.)

These provisions of the acceptance agreement necessarily created a contractual lien as against the drafts and their proceeds supporting the acceptance agreement which subjected them to the burden of paying the general indebtedness due from Richfield to appellant bank.

The legal effect of depositing the short term drafts under the acceptance agreement, and as security for acceptances, necessarily changed their status because as and when deposited they immediately became subject to the terms and provisions of the acceptance agreement which removed them from the operation

and effect of the agreement under and in reliance upon which Richfield's entire foreign business was turned over to appellant bank. It was never contended and is not now asserted by appellee that in the agreement under which Richfield's foreign business was turned over to appellant bank any distinction was made or attempted to be made between the long term and the short term drafts. No such distinction had to be made or was contemplated because if the acceptance agreement had not been negotiated the whole of the foreign business, including all drafts, both short and long term, would have been freed from the danger of the exercise of a banker's lien because of any antecedent indebtedness. As a matter of fact, at the time the transfer of Richfield's foreign business to appellant was first negotiated, acceptances were not only unknown to but not thought of by Richfield or its officials. It was appellant's initiative upon this subject that finally persuaded Richfield to obtain funds by means of acceptances. Prior to that time it financed itself by discounting its foreign drafts. This is shown by Mr. Gilstrap who testified:

> "I suggested to Mr. Hall that if the business was an extension of credit it might be more economically handled from Richfield's point of view by means of banker's acceptances rather than by a direct discounting of foreign acceptances. I am positive that I suggested that to Mr. Hall and that Mr. Hall did not suggest it to me." (R. p. 369.)

It will thus be seen that that portion of this court's decisions relating to the subject-matter just discussed is undoubtedly based upon a misunderstanding of appellee's position and a misconception of the evidence relating thereto.

(b) The agreement between Hall and appellant officials that all drafts and their proceeds should be deemed to be separate and apart from other business of Richfield with and its financial obligations to appellant constituted such drafts and proceeds a special fund and a deposit against which no banker's lien or right of set-off existed.

Although this branch of the case was of the utmost importance to appellee, but meager attention is given to it in the opinion rendered by this court. Apparently the court was of the opinion, as stated by it,

> "that the agreement between the parties involved a 'mere separation of the deposit accounts' (p. 12) and that 'this arrangement was made according to the testimony of Hall and Pope as a matter of convenience because of Hall's agreement with Richfield Oil Company concerning commissions'." (p. 12.)

These statements we submit are unjustified by the evidence. In reaching this conclusion the court has entirely overlooked not alone the circumstances surrounding the agreement and which induced and persuaded its making, but the agreement itself. The

statement of Hall that he was entitled to commissions from the foreign business of appellee was merely one of the reasons why he was interested in keeping the foreign business separate from all other business of Richfield including its indebtedness to appellant. But the real basis of the agreement which appellee claims was proved by overwhelming and convincing evidence and found by the lower court to have been entered into, was Richfield's immediate necessities to enable it to carry on its business and survive. It could not and would not have turned over its foreign business to appellant unless it could be assured that the proceeds of its foreign business would not be endangered by any attempt on the part of appellant to enforce Richfield's indebtedness to it by the exercise upon it of its banker's lien.

While the evidence upon this subject is revealed in appellee's brief (pp. 13 to 25) to which we respectfully refer the court, the importance of this controversy to appellee impels us to recall to the court those portions of the record clearly indicating that the court's position with respect to this matter is inaccurate. At the time this agreement was negotiated Richfield owed appellant an unsecured indebtedness of $625,000 evidenced by a promissory note which was to mature on October 10, 1930. In the absence of the agreement referred to, the moment such unsecured indebtedness matured appellant would have been legally authorized to exercise its banker's lien upon all of Richfield's foreign business. The right of a bank to exercise its banker's lien and right of set-off

was known to all of the executives of Richfield including Hall. (R. p. 341.) At this time Richfield was and thereafter continued to be in dire need of funds. (R. p. 341.) The profit upon its foreign business was almost negligible in character and the cost of purchasing and making ready its commodities for foreign shipment, as well as the freight charges thereon, had to be advanced. Faced with these conditions it could ill afford to take the chance of depositing with appellant its foreign collections involving large sums unless it was understood that neither the drafts themselves nor their proceeds when collected, could be utilized by appellant in the extinguishment, either in whole or in part, of an unsecured indebtedness far in excess of the collections entrusted to it. The executive officials of Richfield, as well as Hall, knew that many banks substantial in character existed in California to which no indebtedness was owed by Richfield and to which its collections could readily be entrusted without being menaced by the possible exercise of a banker's lien or right of set-off. That Richfield would deposit its foreign drafts for collection with appellant in the absence of a special agreement preventing the exercise of its banker's lien or right of set-off is unthinkable. Aside from this situation, Hall was interested in the financial success of the foreign department of which he was manager because he had not only built it up but upon such success depended the amount of compensation to which he was entitled. It would indeed be remarkable if under the proven circumstances Hall would have failed to insist upon the agreement testified to by him. That the

agreement was made is clearly shown by his evidence. In August, 1930, during the first conference occurring between him and Gilstrap, Hall testified:

> "I discussed with him the general situation, Richfield Oil Company's collections, and stated that I was contemplating turning over all of the Richfield collections, being foreign collections, as far as possible to them. I explained to him that I would be responsible as far as possible for those collections and watch them * * * *I asked him to remember that any transactions were to be considered separate from other transactions of the Richfield Company*—the entire transactions, monetary, the collection of drafts for us or any other business connected with the Foreign Department of Richfield Company." (R. p. 340.)

> "I stated to him that I had an interest in all collections which were emanating from the Foreign Department *and that I wanted him to consider that it was a separate business arrangement from any other business which Richfield had with Wells Fargo Bank. Mr. Gilstrap said that he understood my position.*" (R. p. 341.)

After his preliminary conference with Gilstrap Hall was taken by Mr. Hellman to Mr. Lipman, president of the bank. As to what occurred upon this particular subject Hall testified that he told Lipman

> "* * * that I had a personal interest in the collections of the Department, *and I wanted it considered to be a separate transaction from any obligations or any transactions other than those of the Foreign Department—Richfield obligations I mean.* Lipman then *said, 'That is good' or 'that is excellent'.*" (R. p. 343.)

And upon cross-examination he reiterated that he stated to Mr. Lipman

> "that it was to be understood that this further credit was to be kept separate and be a distinct arrangement with the Foreign Department." (R. p. 358.)

Upon the visit of Hall and Pope to the bank on the morning of October 6, 1930, this arrangement was again made the subject of discussion. According to Hall, after Gilstrap, at the request of Pope, had telephoned to Mr. McKee,

> "I there reiterated my former conversation with Mr. Gilstrap that if the acceptances were used it must be definitely understood that it was a separate transaction from any other transaction in a monetary way which Richfield had with Wells Fargo Bank. I was following orders in that respect from Mr. McKee." (R. p. 346.)

Mr. McKee, whose orders Hall was following, was one of the chief executives of appellee. The above testimony is corroborated by Pope, who testified:

> "During the course of the conversation Mr. Hall said he wanted the transaction with the Foreign Department considered a thing apart from the regular transactions of Richfield with the bank."

And still later

> "As I remember it, the substance of his statement was that he wanted the Foreign Department business of Richfield kept as a separate and distinct transaction from other business that Rich-

field might do with the Wells Fargo Bank." (R. pp. 325-6.)

The testimony of Hall and Pope above quoted was corroborated by Frederick Lipman, president of appellant, who was called as a witness on its behalf. He was the officer to whom all of the other officials of the bank referred in determining the credit which should be extended to Richfield on its foreign collections. To him Hall was brought after conferring with Gilstrap and Hellman. Lipman's testimony was:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the Foreign Department and not the general treasury relations with the company *and he did not want the two mixed up; he wanted them kept separately.*"

This testimony of Mr. Lipman is corroborated by Frederick J. Hellman, vice-president of appellant. Testifying to the conversation between Hall and Lipman, he stated:

> "As I remember it, we then stood up and were going out of the door and Mr. Hall said to Mr. Lipman, 'I want it understood'—**No, not that.** He said, 'You must realize that I am not in the financial end of the business; that I am only the manager of the foreign department, and I will have to get the consent of my superior to put this credit through.' He further said that he knew we were giving them a line of credit of $625,000, *and if this acceptance credit was going to interfere with the line downstairs, he knew they would not consent to it, and he wanted the acceptance*

credits separate from the loan downstairs." (R. p. 438.)

On cross-examination Hellman testified:

> "Mr. Hall said he wanted these acceptance transactions to be considered separate from the loan line. * * * *He used the word 'separate', and he referred to the loan of $625,000.* The essence of the statement is that he wanted it considered separate from the loan line of $625,000." (R. pp. 445-6.)

Several months later, when appellant finally exercised its banker's lien upon the drafts here involved, Hall came to San Francisco and protested against appellant's action. During the discussions which followed, one of the reasons given by Hall why the action taken by the bank was without justification was that it had made the agreement to keep these transactions separate and apart from all other business with and financial obligations of Richfield. He endeavored to refresh the memories of Mr. Gilstrap and Mr. Eisenbach with respect to the agreement. (R. pp. 350-1; 364.) Not only were such statements not denied (R. p. 351) but Hall testified that Gilstrap said

> "that Wells Fargo Bank was going to grab that money. I asked him why and he said they were going to do it, exercising a lien on it for other indebtedness owed the bank. I stated that I was very surprised since they had agreed not to touch any of the collections of the Foreign Department with Richfield Oil Company. He said he was sorry but that was the decision of the bank." (R. p. 350.)

But, aside from this conclusive evidence establishing the making of the agreement, the subsequent conduct of appellant clearly proves that until May 8, 1931, when it attempted to seize the proceeds of some of the drafts, the existence of the agreement was constantly given recognition by it. As already stated, the promissory note executed by Richfield evidencing its unsecured obligation to appellant, matured on October 10, 1930. In the absence of the agreement under discussion, at any time after October 10, 1930, appellant would have had a right to exercise its alleged banker's lien upon the drafts deposited with it for collection, or its right of set-off against their proceeds. Notwithstanding such alleged right, not only did appellant fail to exercise said banker's lien or right of set-off until May 8, 1931, but between October 10, 1930, and May 8, 1931, it credited to the account of Richfield and thereafter to the receiver, the net proceeds of certain drafts theretofore collected by it, totaling $39,469.53. Of these sums $31,719.99 was so credited without any request of any kind emanating from appellee or the receiver. (R. pp. 333-4.) The remaining $7749.58 was deposited to the receiver's account in accord with appellant's letter of March 5, 1931 (Appellant's Ex. 108) after the receiver had called its attention to its wire of January 16, 1931. (Plffs. Ex. 3.) * * * Appellant's failure to exercise its banker's lien and right of set-off between October 10, 1930 and January 16, 1931, notwithstanding its anxiety to obtain payment of the unsecured indebtedness due to it by appellee, is directly traceable to its recognition of the so-called Hall agreement.

It must be clear that the evidence to which we have just invited the attention of the court establishes something more than a mere "keeping upon the books of separate accounts to subserve the convenience of either Richfield or one of its employees." Any such arrangement would have been readily acquiesced in upon the request of Hall made to either Gilstrap or one of the tellers of appellant. If an arrangement such as that alone were contemplated, it would not have been the subject-matter of discussion between Hall, representing Richfield, and Gilstrap, and later Hall and Mr. Lipman, president of appellant, and Hall and Hellman. Nor would it upon the subsequent visit of Hall and Pope have again been the subject-matter of conferences and negotiations between them and Gilstrap.

Keeping in mind that the foreign collections of Richfield were vital to its very existence and constituted part of its "life's blood" and that the purpose of the agreement was to render available to it at all times the proceeds of such foreign business, except to the extent necessary to meet the acceptances and protect such proceeds against being subjected to the payment of the unsecured indebtedness due to appellant, as well as the character of the negotiations occurring between the parties, it is not logically possible to reach any conclusion other than that the agreement that the business of the Foreign Department including the drafts and their proceeds should be deemed to be separate and apart from other business with Richfield and its financial obligations to appellant, and constituted such drafts and proceeds a special fund

and deposit as against which no banker's lien or right of set-off existed. If such was the agreement, then under the authorities appellant was prohibited from subjecting such foreign collections to its banker's lien or right of set-off.

For a statement of the legal principles applicable to and citation of the authorities in their support we respectfully invite the court's attention to appellee's brief, pp. 139 to 156.

In any event, the interpretation of the negotiations and conversations between the parties, what the agreement was and what was intended thereby were questions of fact for the trial court and not the appellate court to determine. The trial judge who patiently listened to the evidence and observed the witnesses testifying concluded that the agreement was as characterized by appellee. Appropriate findings upon this subject followed. (R. pp. 184-5.) Such determination by the trial judge should be conclusive upon this court.

IV.

APPELLANT BANK WAIVED ITS BANKER'S LIEN AND RIGHT OF SET-OFF AS AGAINST ALL COLLECTIONS OF RICHFIELD EXCEPTING THOSE SPECIFICALLY DEPOSITED UNDER THE ACCEPTANCE AGREEMENTS.

We cannot help but feel that the conclusion reached by this court in determining the proposition above entitled adversely to appellee must have been induced by our apparent inability to picture to the court the situation existing at the time the telegrams were ex-

changed, the information which was then in the possession of appellant bank, and the purpose intended to be accomplished by such exchange of telegrams.

While we are convinced that these telegrams, read in the light of the surrounding circumstances, demonstrate a waiver of appellant banker's lien and right of set-off as contended, we have no hesitation in stating that the best that can be said from the standpoint of appellant is that there might exist a doubt as to their construction and interpretation. Assuming such to be the fact, however, the finding of the lower court with respect to such construction and interpretation based upon the communications themselves, as well as all of the surrounding circumstances and facts, together with the subsequent conduct of the parties, is conclusive upon this court and should not be avoided on appeal.

The conceded situation existing at the time the telegrams were sent, briefly stated, is as follows:

For some months prior to January 15, 1931, Richfield was involved in financial difficulties. It owed various banks in excess of ten million dollars, no part of which was secured. (R. p. 205.) It was indebted in a large sum to a number of merchandise creditors, some of whom were pressing for payment. It was only with much difficulty that it was able to meet pay-rolls, freight charges and current indebtedness due public utilities which could not be delayed. Litigation was threatened which, if commenced and prosecuted to final judgment, would not only result in the sacrifice of its properties but would prevent it from carrying

on its business and in all probability force it into bankruptcy. This distressing situation was known to most of Richfield's creditors but particularly to its bank creditors including appellant.

To avoid bankruptcy a receivership was determined upon by Richfield's creditors including its bank-creditors. Appellee was appointed receiver and on the same date ancillary receiver in this district. (R. pp. 205-8.) Each of these orders appointed appellee receiver "of all the *property, assets and business* of Richfield." (R. p. 90.) By the terms of each order appellee was authorized

> "forthwith to take and have complete and exclusive control, possession and custody of all of the *property* and *assets* of Richfield (R. p. 92) and to continue, manage and operate the business of the defendant * * * to the end that the operation of the business of the defendant should not be interfered with or interrupted." (R. pp. 93-4.)

It is quite apparent that the principal purpose sought to be achieved by the appointment of the receiver *was to enable the business* of Richfield to be carried on in the expectation that as a result of such procedure the indebtedness, or a considerable part of it, due to the creditors would ultimately be liquidated. A copy of the order appointing appellee receiver was immediately transmitted to the creditor banks of Richfield, whereupon some of them in the exercise of their right of set-off, applied the cash balances of Richfield in partial payment of the indebtedness due to them. (R. pp. 203-6.) Learning of such action and realizing that unless there was made available to him

all cash balances and all other credits belonging to Richfield in the possession of said banks, it would be impossible to carry on its business, a meeting was called by the receiver for January 16, 1931, which was attended by representatives of all of the creditor banks excepting appellant and one other bank. (R. p. 205.)

During this meeting the receiver explained to those present its purpose and among other things said,

> *"I told them that it was not only necessary that I have the balance restored, but that I have their assurance that the normal flow of business would be allowed to go on. Collections were coming in, of course, that if they merely restored my balances that it would be obvious that it would be impossible to carry on the business if collections were seized. I asked them if they would not restore to me all funds that might be available."* (R. pp. 206-7.)

He also explained that the business of Richfield was dependent upon the receiver having available

> "all of its funds; that is, **all assets of every character"** * * *

so that the receiver might endeavor to continue the business in some operating form **and that without funds such action was utterly impossible.** (R. p. 228.)

According to the witness, Edward J. Nolan, chief executive of the Bank of America, Richfield's largest creditor, the receiver also informed the bank that

> "all the **credits and all the funds and all the assets, especially the current assets** that belonged to the company must be turned over to him;

otherwise he could not carry on the affairs of the company." (R. p. 241.)

That the drafts deposited with the bank for collection, as well as the collections themselves, were *credits* and *assets* of Richfield to which, as well as to the cash balances, the receiver was referring is likewise shown by Mr. Nolan, his testimony upon this subject being:

> "I understand balances in bank would be such items as are deposited for credit and collected, * * * **I would regard foreign drafts deposited with a bank for collection as credits and when the drafts are collected and the money comes into the possession of the bank I would regard that as cash balances.**" (R. pp. 245-6.)

Upon cross-examination he testified:

> "Foreign drafts can be considered as credits." (R. p. 246.)

And on redirect examination:

> "If a draft is deposited in a bank by a depositor or a merchant for collection I would regard that as one of its *credits.*" (R. p. 247.)

It is therefore manifest that while the receiver was directly concerned with the restoration of the cash balances offset, and while he was insistent that other banks should agree not to offset cash balances in their possession, it was imperative for him to insist that all bank credits should agree that **all assets and credits** in their possession belonging to Richfield should be made available to him, otherwise he would retire from the receivership and the company would go into bankruptcy.

At the time of this meeting, while some of the banks had checks and credits in transit, the only banks which had foreign drafts in their possession were Security-First National Bank of Los Angeles and appellant. (R. p. 216.) These facts were known by the receiver and also by the representative of the Security Bank. That appellant bank must have known that the Security Bank had such collections can clearly be inferred from the fact that its credit official constantly kept in intimate touch with its financial condition and affairs. (R. pp. 451, 455.)

It was agreed by the bankers present—as to some of them, however, subject to ratification by their respective banks—that if those banks which had offset the cash balances would restore such balances, and if all banks would agree to make available to the receiver all **credits in their possession, none of the banks would exercise their banker's lien or right of setoff against funds or credits** of the Richfield Company. (R. p. 432.) Accordingly, at the conclusion of the meeting a telegram was prepared by some of the bankers present, in cooperation with the receiver, to be sent to each of the banks for the purpose of carrying into effect the object sought to be accomplished by the meeting. Among those participating in the preparation of the telegram was the representative of the Security Bank which, as already shown, had in its possession foreign drafts not yet collected. (R. pp. 209-242.) This circumstance is important because his understanding of the telegram sent (Plffs. Ex. 2) and appellant's response (Plffs. Ex. 3) is shown by the action of the Security Bank in making available

to the receiver not only its cash balances *but all collections subsequently made by it upon these foreign drafts.* The telegram which was prepared and transmitted to appellant bank (Plffs. Ex. 2) reads as follows:

> "As receiver I am ordered by federal court to take *over all assets including cash in banks* Stop While you have undoubted *right of offset* such *right if exercised would seriously cripple receivers operations* It is necessary therefore to request that all banks restore to receiver full cash balances Stop Please therefore transfer such funds to a new account on your books in my name as receiver Evidence of my authority and signature cards will follow by mail Stop Local banks have indicated *they will acquiesce in this program.*"

A reading of this telegram will disclose that the *program* referred to was the taking over by the receiver of **"all assets including cash in banks"**. The right of offset referred to was the right of offset as against **"all assets including cash in banks"**. The program in which "local banks have indicated they will acquiesce" is the turning over to receiver of all **assets including cash in banks.** The telegram therefore clearly indicated to appellant that the agreement to be entered into was to turn over to the receiver **"all assets** of the Richfield Company **including** cash in its possession", and that as to such **assets** and cash its right of offset should be waived.

At this point it may be well to direct the court's attention to its decision wherein, with respect to the

meeting which preceded the sending of the telegram this court said:

> "The appellee also introduced evidence to show the subsequent conduct of the other banks with relation to their waiver of the agreement. Their conduct was not brought home to the appellant and is of no significance whatever, and even if brought to the attention of the bank after the transaction was closed would be without significance. There was no estoppel." (p. 17.)

We submit there is no justification for such holding because according to the uncontradicted testimony, immediately upon the conclusion of the conference and before any wires passed between the parties at the request of the receiver and in order that appellant might be fully cognizant with what had occurred, Mr. Nolan telephoned to Mr. Eisenbach, vice-president of appellant and in charge of its Credit Department, and acquainted him fully with what had occurred, his testimony being:

> "During the course of my conversation with Mr. Eisenbach I stated to him *the substance of what had occurred at the meeting of the bankers.* (p. 243.) * * * It was intended to be the agreement with the banks with some amplification * * *. The amplification was not that something was desired besides the telegram itself, but to explain to the banks not present the dire condition of the company and the importance and necessity of returning the balances at once or else the company would be forced into bankruptcy." (R. p. 245.)

Later on he testified:

> "* * * I told Mr. Eisenbach it would be necessary that the receiver have all the funds of the Richfield Oil Company for the purpose of continuing the business and to avoid bankruptcy. * * * I tried to pass on to Mr. Eisenbach just what took place at the meeting that morning." (R. p. 246.)

And that appellant had notice of the action of the other banks is shown by the receiver's telegram to appellant dated January 22, 1931, and the answering wire of appellant to receiver dated January 23, 1931, which wires appear upon pages 13 and 14 of this court's decision. In response to the receiver's wire of January 16, 1931, appellant answered:

> "Replying telegram we are willing to restore in your name as receiver Richfield's balance in checking account provided we are notified by you that all company's banks have taken similar action. **We are holding certain collections as security for acceptances Please understand we continue to reserve all our rights for bankers lien against these collections."** (Plffs. Ex. 3.)

It will be observed that this telegram was written and sent by Julian Eisenbach, the very official with whom Nolan had had his conversation. It will also be observed that this telegram was not delivered to the telegraph office until 6 P. M., which was long after the Nolan-Eisenbach conversation occurred. It should also be observed that if the receiver had merely been interested in cash balances or if the Security Bank had not been interested in learning that

the foreign collections in the possession of appellant bank would be made available to the receiver, no reason would have existed for the conversation between Nolan and Eisenbach.

It is impossible for us to appreciate how, under the proven circumstances, this court concluded that it was justified in holding that by its telegram appellant reserved its banker's lien on all credits and foreign drafts in its possession, and that its *sole* purpose was merely to agree to restore the offset balance of Richfield. At the time of its preparation appellant had before it the order appointing the receiver containing the language above quoted. (R. p. 203.) It knew that the receiver, to carry on the business of Richfield which was the purpose of his appointment, had to have available to him **all credits** of Richfield. It had before it the receiver's wire prefaced with the statement:

> "I am ordered by federal court to take *over all assets,* including cash in banks"

and it had in mind the information given by Mr. McDuffie to the banks, as well as the discussions occurring at that meeting, the substance of which had been conveyed to it by Nolan. Furthermore, it had in its possession CERTAIN foreign collections as security for the acceptances previously executed by it then outstanding. The inclusion within its telegram of the language

> "We are holding certain collections as security for acceptances Please understand that we continue to reserve all our rights for banker's lien against *these* collections"

would be both unnecessary and meaningless if its *sole* intention was to agree to restore the offset balances. That information had already, in apt language, been conveyed by the wire.

That the receiver understood the telegram to mean what is here contended is conclusively shown by his testimony both upon direct and cross-examination. (See appellee's brief, pp. 70-71.) That the telegram was so construed by the Security Bank is made manifest by the fact that it not only abstained from exercising any right of set-off as against the cash balance of Richfield in its possession, but subsequently collected and paid to the receiver $152,524.03.

As further emphasizing the understanding of the remaining creditor banks with respect to the meaning of appellant's wire, it was proved that when they learned that appellant had appropriated the collections here involved, according to McDuffie

> "Every one of them protested not only that they felt there was no right in it, but also that they, themselves, never would have restored their balances had they thought Wells Fargo was reserving in its mind this character of right." (R. p. 237.)

But in addition to what has here been said upon this subject, appellant itself considered its telegram of January 16, 1931, as reserving a lien *only* upon the drafts under the acceptances. The receiver was appointed on January 15, 1931. On February 26, 1931, the last group of acceptances aggregating $25,000 was paid in full. On February 24th it had in its posses-

sion $23,530, the proceeds of certain drafts collected by it. Between February 14th and February 26, 1931, it collected $9249.28 upon four drafts from which it deducted $1499.70 which, with the funds previously collected, paid the acceptances in full. Appellant then had remaining in its possession $7749.58, the proceeds of these foreign collections. With respect to this sum it advised Richfield by letter (Plff's. Ex. 107):

> "the remainder of the proceeds total $7,749.58, we are holding in accordance with notice given you in our wire of January 16th."

In view of the receiver's understanding of the wire of January 16th and concluding that his recollection of its contents was inaccurate, he requested appellant to repeat such telegram, which was done. Upon receipt of this wire appellee undoubtedly compared it with appellant's original telegram of January 16th (Plff's. Ex. 3) and observing no difference in the wires and being convinced as he always had been that appellant was without authority to retain the proceeds of these drafts under its reservation contained in such wire, on March 3d wrote appellant the following letter (Plff's. Ex. 106):

> "Referring to your letter of February 26th, advising us of payment of certain drafts totaling $9260.81, less certain charges amounting to $11.53, leaving a balance of $9249.28 from which you are taking $1499.70 to meet the balance due on acceptances February 26th, leaving the sum of $7749.58 to be credited to our account, *and referring to your telegram of January 16th,* I beg

> to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15th, 1931, to the credit of William C. McDuffie, Receiver. *I will therefore appreciate it if you will kindly credit the remainder of the proceeds so mentioned about $7749.58 to the credit of Richfield Oil Company of California, William C. McDuffie, Receiver, and advise us as soon as this transfer has been made.*"

Thereupon and on March 5, 1931, *and without any further communication passing between appellee and appellant,* appellant credited the receiver's account with $7749.58 and wrote to appellee a communication stating, among other things:

> "In accordance with your request we are crediting the account of William C. McDuffie, Receiver Richfield Oil Company of California, with the sum of $7749.58.
>
> We are also crediting this account with $11082.51 representing proceeds of collection No. 13106 of the Richfield Oil Company, particulars as per memorandum attached." (Plffs. Ex. 108.)

It must be obvious that when the language of the wire of January 16, 1931, was called to the attention of appellant and when it recalled the circumstances under which it was prepared and the purpose sought to be achieved by the receiver, as well as all bank creditors of Richfield in negotiating the agreement, it realized that the receiver was entitled to the funds and that it had no claim against them. Further-

more, it voluntarily and without any request from the receiver, turned over to him the additional $11,082.51 referred to in the communication.

Between February 26, 1931, and May 8, 1931, in addition to the four drafts above mentioned and in addition to the $11,082.51, the bank collected the proceeds of nine drafts, the net proceeds of which amounted to $15,381.62, and deposited each of these collections to the account of receiver and this without any affirmative act or request upon the part of the receiver or Richfield.

In connection with this situation it should be noted that whenever a draft was collected and its proceeds credited to the receiver's account a written advice of such action was transmitted by appellant to receiver, and in no instance did appellant, by letter, wire or word of mouth, assert, intimate or suggest that it was reserving or claiming to reserve or had the right to exercise any banker's lien or right of set-off as to these drafts or their proceeds.

There is much additional evidence of surrounding circumstances and facts in the record which are clearly pointed out in appellee's brief, but to which, in order to avoid further prolonging this petition, no reference is herein made. We have, however, in our judgment reproduced sufficient of the record to establish that appellant not only waived, but intended to waive its banker's lien as against all foreign collection in its possession excepting those deposited under the acceptance agreement.

But, in any event, as we have had occasion to heretofore point out, the best that can be said in favor of appellant upon this subject is that there might be some ambiguity or uncertainty as to what was intended by the passage of the telegrams, and that therefore resort to extrinsic evidence consisting of the surrounding circumstances and facts—including the construction placed upon the wires by the parties themselves evidenced by their subsequent acts and conduct, was legally proper. The interpretation to be placed upon these telegrams, read in the light of the surrounding circumstances, became a question of fact for the trial court, and not a question of fact for the appellate court. Such determination by the trial court should be conclusive here.

CONCLUSION.

We believe we should apologize for the apparent undue length of this petition for rehearing. Ordinarily in a petition of this character a discussion of the evidence is unnecessary. In this controversy, however, because of the propositions determined by this court, which involved the legal sufficiency of certain of the evidence contained in the record, we had no other alternative. We might justly add, however, that the extreme importance of this litigation to our client, to the Richfield Oil Company and to its creditors made it imperative that this petition be presented in its fullness.

It is respectfully, but with great confidence insisted, that for the reasons indicated a rehearing of this controversy should be granted.

Dated, San Francisco,
July 6, 1934.

GREGORY, HUNT & MELVIN,
WM. H. HUNT,
WARD SULLIVAN,
SULLIVAN, ROCHE, JOHNSON & BARRY,
THEO. J. ROCHE,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 6, 1934.

THEO. J. ROCHE,
Of Counsel for Appellee and Petitioner.

No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO. (a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

APPELLANT'S ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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The extensive Petition for a Rehearing filed by appellee in these proceedings involves in substance only three points. First, that this Honorable Court unduly narrowed the application of the parol evidence rule in determining the subject matter of the acceptance agreement dated October 4, 1930, and that appellee did not have an opportunity to be heard with respect to this phase of the Court's decision; second, that at the beginning of the transactions involving foreign collections the appellant bank, by agreement, waived its banker's lien and right of set-off against all of the foreign collections, and third, that appel-

lant, subsequent to the appointment of the Receiver, waived its banker's lien and right of set-off.

It is primarily to the first of these three points (separated into two parts in appellee's petition), that our reply will be directed because, in fairness to appellee and to the skill and ability of his counsel, it must be conceded that the arguments in support of the waiver of the right of lien or set-off, either at the inception of the transactions or after the appointment of the Receiver, were as skillfully and as thoroughly presented in the greater part of the 182 pages of appellee's brief on appeal as was humanly possible under the facts and in view of the law.

But before considering appellee's first contention we believe that the "Foreword" of the petition should be noted. It is there urged as the apology for the length of the petition and as an explanation of the duty of appellee's counsel in presenting the same, that this Honorable Court failed to observe, if this case be in law, that the findings of the trial Court, based upon conflicting evidence, are controlling herein, or, if this case be in equity, that the decision of the trial Court upon the questions of fact should not be interfered with unless clearly erroneous. This argument is repeated throughout appellee's petition. Counsel for petitioner adroitly leave in doubt whether this appeal is in law or in equity and overlook the cases cited by us in our reply brief on appeal,

Busch v. Jones, 184 U. S. 598 (1901);

Carnegie Steel Co. v. Colorado Fuel & Iron Co., 165 Fed. 195;

which hold that *when equitable jurisdiction once attaches it may not be lifted by subsequent conditions which would have necessitated the filing of the action at law if the action had not been filed until after the occurrence of such subsequent conditions.* This action was commenced in equity at a time when an equitable proceeding was proper and, under the doctrine enunciated by the cited cases, still remains in equity. As such, this Court may properly follow the rule applicable to equity cases on appeal. In

Waterloo Min. Co. v. Doe et al., 82 Fed. 45,

the judges of this Circuit pertinently stated at page 51:

> "It is further urged by appellees that this court is bound by the findings of facts of the Circuit Court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits."

But actually, whether this case is in law or in equity makes no practical difference in the consideration of the facts on appeal. It is fairly and properly stated by this Court at page 18 of the printed opinion:

> "There is practically no dispute in the evidence except with relation to the conversations between Hall and Pope on behalf of the Richfield Oil Company and of the officers of the Bank who participated in the same conversation."

The whole decision of the Court, as in fact of the trial Court, is not based upon any conflict in the evi-

dence, namely, as to whether certain things were or were not said or done, but as to the *legal effect* of the evidence: (1) whether the drafts herein involved were under the acceptance agreement; (2) whether the so-called instructions from Mr. Hall to keep the foreign transactions separate and apart amounted to a waiver of appellant's contractual or banker's lien, and (3) whether appellant's conduct after the receivership was a waiver of its contractual or banker's lien. These all are, in substance, questions of law to be determined from *subordinate* facts, namely, the facts upon which the conclusions are based. Obviously, this Appellate Court is at least equally as well qualified to draw such conclusions from the facts (which are actually not in dispute) as was the trial Court, although admittedly a trial Court is normally in a better position to determine what the facts themselves are. Irrespective of the binding nature of the trial Court's findings of fact or the extent thereof, *the Appellate Courts are not bound by the conclusions and inferences drawn by the lower Courts from such subordinate facts.* This distinction is recognized by a host of cases. In

Dunn v. Trefry (1919), 260 Fed. (C. C. A. First Circuit) 147,

at page 148, the Court said:

> "We recognize the rule that, where there is a conflict of testimony and the credibility of witnesses is involved, the finding of the District Court is not to be disturbed, unless it is clearly wrong. But where, as here, these circumstances are not present, *and the finding is a conclusion*

from admitted facts, we do not think the rule applies." (Italics ours.)

In *Munroe v. Smith,* 259 Fed. (C. C. A. First Circuit) 1, the Court said, at page 2:

"The case must turn upon the admitted facts, the inferences therefrom, and upon the interpretation of written evidence, in considering which, of course, the District Court had no substantial advantage over this court. *The usual rule of giving great weight to the conclusions of the trial Judge who observed the appearance and the manner of the witnesses is not, therefore, to any substantial degree, applicable in this case.* As we are not able to adopt the views of the District Judge it is necessary to deal in considerable detail with the evidence and necessary inferences therefrom." (Italics ours.)

In *The Natal* (1926), 14 Fed. (2) (Circuit Court of Appeals, Ninth Circuit) 382, Judge Gilbert held, at page 384:

"The rule that findings of fact are entitled to great weight in an Appellate Court is modified where, as here, they are based wholly upon depositions. But we do not regard the finding of fact here as depending upon conflicting evidence or the credibility of witnesses. *It rather depends upon admitted facts and the conclusions inferable therefrom.*" (Italics ours.)

In *Bender v. Bender* (1917 Mo. App.), 193 S. W. 294, the Court stated, at page 295:

"The trial court had the witnesses before it and was able to note the candor and frankness of

> each in testifying, and to note the willingness or the hesitation in answering questions; the readiness to volunteer matters that might appear favorable to one side or the other, or to attempt to hold back that which might prove prejudicial to the case of the party for whom they have been called as a witness * * * For these reasons the Appellate Courts are strongly inclined to defer to the findings of the trial courts in such cases. *However, it is elementary that the Appellate Courts are not bound by the conclusions reached by the trial court, but will examine the evidence and determine whether the proper result has been reached.*" (Italics ours.)

See also:

Rosenfield v. Wall (1920 Conn.), 94 Conn. 418, 109 Atl. 409;

Raftery v. Reilly (1918 R. I.), 41 R. I. 47, 102 Atl. 711;

Weigell v. Gregg (1915 Wis.), 161 Wis. 413, 154 N. W. 645;

and many others.

From the foregoing it is obvious that appellee's apology for the length of his petition herein is based upon a false premise, namely, that this Court was bound in any manner by the trial Court's conclusions and inferences from the facts. Nonetheless, we will consider *seriatim* the points urged in appellee's petition for rehearing.

I.

APPELLEE URGES:

"I.

THE HOLDING BY THIS COURT THAT PAROL EVIDENCE WAS CONFINED TO PROOF OF THE DELIVERY OF THE BILLS OF LADING ALONE IS ONE OF ORIGINAL IMPRESSION BY THIS COURT, IN CONFLICT WITH THE CONTENTION OF BOTH PARTIES AND THE ADMISSIONS OF APPELLANT AND WAS NEITHER DISCUSSED NOR GIVEN CONSIDERATION IN THE BRIEF FILED BY EITHER OF THE PARTIES HERETO. BY THIS HOLDING, APPELLEE HAS BEEN DEPRIVED OF A JUDGMENT OBTAINED BY HIM UPON A THEORY WITH RESPECT TO WHICH HE HAS NOT BEEN ACCORDED THE OPPORTUNITY OF BEING HEARD."

The most obvious answer to this contention is that the Court did not so hold. In support of this argument counsel cite from page 7 of the opinion to the effect that the acceptance agreement does not sufficiently identify the documents of security "without the consideration of parol evidence", and from page 2 of the opinion, which supports appellee's own contention that the references in the written agreements "may be explained by parol evidence." Counsel then cite from the Court's opinion:

> "The transaction between the parties was evidenced with clarity and definiteness by the written acceptance agreement, by the written documents accompanying the agreement, by the written acceptance endorsed by the Bank and by the letters exchanged and by the credit realized to

> the Richfield Oil Company upon nine drafts presented to the Bank for acceptance and needed no additional parol evidence to identify the subject matter of the contract and establish its terms." (p. 8.)

Counsel choose to consider—rather unfairly to the Court, we believe—the foregoing language "and needed no additional parol evidence" as limiting "the introduction of parol evidence to the delivery of the bills of lading." (Petition for Rehearing, pp. 4 and 5.) There is nothing in this or any other language of the Court which so limits the parol evidence. The quotation from page 8 of the Court's opinion is itself the answer to appellee's contention.

The Court concludes, as indeed have counsel for appellee both in argument and in their brief on appeal (Appellee's Brief p. 102) that the Bank, having possession of the shipping documents, was secured for the entire value of the cargo, and terminates its discussion of this particular phase of the transaction with the language on page 8 of the opinion (cited at page 4 of the Petition for Rehearing, and previously quoted herein) to the effect that no *further* parol evidence was *needed* to identify the subject matter of the contract. It is unfair to the Court to take, as counsel have throughout their petition, excerpts from various portions of the opinion, and without correlating them, finding apparent weaknesses which actually do not exist if these same excerpts are considered, as they should be, with the balance of the subject matter of which they are a

part. Thus, on page 4 of appellee's petition a quotation is taken first from page 7, then from page 2, then from page 8 and then from page 7, with no effort made to consider them in any related or logical sequence. But these very quotations which counsel claim show that the Court held that the parol evidence was confined to the proof of delivery of the bills of lading defeat counsel's purpose, notwithstanding the disarrangement of the sequence of the Court's declarations. Thus, counsel misconstrue the statement of the Court on page 8 that no additional parol evidence was *needed* to mean that further parol evidence was not admissible, and at the same time overlook the fact that in the very next paragraph the Court quotes verbatim appellee's contention as to the distinction between the short-term and long-term drafts. Here, as elsewhere in the opinion, the Court clearly indicates the full consideration which it has given to all of the many arguments presented by appellee.

Petitioner, in citing extensively from appellee's Brief on Appeal (Petition pp. 5-8) to establish the obvious fact that the question before the Court is as to what drafts were or were not security for the acceptances, attempts to distort the effect of these quotations into an inconsistency with the Court's holding. But nowhere in the opinion does the Court even inferentially state that the parol evidence upon which appellee most strongly relies, that is, the evidence to the effect that the 180-day Birla Bros. drafts were not to be considered as a basis for acceptances, was inadmissible. The Court does tacitly hold that such parol evidence, although admissible, did not amount to an

agreement by which the 180-day drafts would not be considered as security under the acceptance agreement. Obviously, the drafts and the proceeds thereof were security for the acceptances and in each case, delivered to appellant with identical accompanying letters of transmittal (Plaintiff's Exhibits 22, 23, 26, 27, 40 to 83 inclusive. Record 266, 291, 292 and 293) which referred to the enclosing therewith of invoices, insurance policy and accompanying bills of lading.

The Court considered the evidence which was presented with respect to the 180-day Birla Bros. drafts, including the letters of transmittal (one of which is set forth on page 6 of the Opinion), the Lyons letter delivered by Mr. Hall (Opinion p. 6), the acceptance agreement (Opinion p. 4) and concludes that no additional evidence was *needed* to establish that the 180-day Birla Bros. drafts, whose proceeds constitute the principal items of this appeal, were deposited under the acceptance agreement. The answer to petitioner's first contention is, therefore, both obvious and decisive. The Court did not hold that "parol evidence was confined to proof of the delivery of the bills of lading alone" but that the evidence presented and considered by it, including the great volume of parol evidence introduced by appellee, was sufficient to establish that these drafts and their proceeds were security for acceptances.

II.

AS HIS SECOND POINT APPELLEE URGES:

"II.

THE DETERMINATION BY THIS COURT THAT PAROL EVIDENCE WAS INADMISSIBLE TO ESTABLISH THAT THE SUBJECT MATTER OF THE ACCEPTANCE AGREEMENT DATED OCTOBER 4, 1930, AND THE CONSIDERATION FOR THE ACCEPTANCES RELEASED THEREUNDER CONSISTED SOLELY OF FOREIGN DRAFTS, AND THE CHARACTER OF SUCH DRAFTS, IS IN CONFLICT WITH THE THEORY UPON WHICH THE TRIAL WAS CONDUCTED BY BOTH PARTIES, WITH THE ADMISSIONS OF APPELLANT, INVOLVES A MISCONCEPTION OF THE WRITTEN EVIDENCE UPON WHICH SUCH DETERMINATION WAS REACHED AND LACKS JUSTIFICATION IN THE RECORD."

Much of what has been said by us in answer to appellee's first point is equally applicable to the second and will not therefore be repeated unnecessarily. Like the first point the second is based upon a false premise. The Court did *not* hold that parol evidence was inadmissible to establish the subject matter of the acceptance agreement. On the contrary (as noted in the quotation from page 7 of the opinion, set forth on page 10 of appellee's petition) the Court recognized the necessity of establishing the subject matter by parol evidence but held, with respect to the 180-day drafts and the proceeds thereof, that in view of the agreement itself, the written documents accompanying it, the written acceptance endorsed by the Bank, the letters exchanged, and the credit realized by Richfield

on the nine drafts presented to the Bank, no *additional* parol evidence was *needed*. (Opinion p. 8.) In attacking this conclusion petitioner urges that the acceptance agreement was a printed form not adaptable to the instant transaction and that the Court failed to give due recognition to the lack of familiarity of the Richfield officials with acceptances and acceptance agreement. Just how such use of a form or the ignorance of officials could affect the decision of this Court it is difficult for us to determine.

Counsel place most emphasis upon the reference in the Court's opinion to the fact that the bills of lading identified the "goods" mentioned in the acceptance agreement. They urge therefore that the Court's decision ignores or overlooks the numerous references, in appellant's and appellee's briefs, to "drafts" as security for the acceptances, and substitutes "bills of lading". But counsel themselves overlook the fact that the drafts in every instance were accompanied by shipping documents and bills of lading; that the drafts were required to be secured; that throughout the record there are numerous references to the advances made by appellant against *shipments* and to bills of lading and shipping documents; counsel forget the emphasis which they themselves placed upon the fact that when the 90-day drafts covering one-half of each of the Birla Bros. shipments were paid the remaining 180-day drafts would be without security, seeking to conclude therefrom that the 180-day drafts were not subject to the acceptance agreement. As stated at page 41 of appellant's Brief on Appeal:

> "The first items transmitted subsequent to the execution of the agreement are the four Birla Bros. drafts, and the Richfield Oil Company has on its own stationery, by its own officer, and in its own language, requested appellant to 'please release *against* this shipment $115,000 worth of acceptances'. As the shipment was represented by the sight *and* 180 day drafts, the release of acceptances was *against them.*"

We believe that it was upon this theory, viz., of a release of acceptances against *shipments,* that the Court reached the inescapable conclusion that the two 180-day Birla Bros. drafts were deposited under the acceptance agreement. In fact in an attempt to avoid this result appellee himself stated at page 102 of his Brief on Appeal:

> "Appellant undoubtedly satisfied itself that all of these customers were financially responsible except Birla Bros., Ltd., as to which certain adverse information was received from its correspondent in Calcutta. (R. 346.) As to the latter, however, no objection could be urged against sight drafts drawn by it *for the reason that such sight drafts had to be paid in full before the documents representing the shipment would be delivered.* (R. 401.)" (Italics appellee's.)

That the question of the security for the drafts (i. e. the goods shipped, represented by the bills of lading) was fully appreciated by counsel for appellee is illustrated not only by their brief on appeal but by testimony developed by them with great care and for some not entirely explained purpose. Thus, counsel

on cross-examination urged Gilstrap to admit that after payment of the 90-day Birla Bros. drafts the companion 180-day drafts were unsecured by any merchandise (R. 420), but that:

> "If the sight drafts had not been paid, we would then have had an advance to the Richfield Oil Company on these acceptances of $115,000, and as security for that, the shipment to Birla Bros." (Redirect examination R. 421.)

Counsel throughout sought to establish that the Bank was sufficiently secured by the 90-day drafts, with the accompanying shipping documents and bills of lading and did not *need* the added security of the 180-day drafts. How, then, can counsel now criticize the opinion of this Court because it adopted in substance the language of Mr. Lyons, Comptroller of Richfield Oil Company, as used in defendant's Exhibit "A", in finding that the acceptances were issued against and secured by the Birla Bros. *shipments?*

In support of their second point counsel urge:

"(a) The printed acceptance agreement was a mere form used to subserve the convenience of the parties and was not the form of agreement adaptable to the transaction being consummated."

As previously stated, the effect, if any, of this argument is difficult to understand. Both parties executed an agreement which, even though printed and even

though a form, was a binding obligation as between them. With reference to the parol evidence which might be introduced this Honorable Court upheld appellee's own contentions in the following language:

> "The appellee correctly contends that the written agreements must be construed according to their terms and that these terms are conclusive as to the agreement between the parties, but that the references therein to drafts and to the documents may be explained by parol evidence" (page 2),

but concluded that the 180-day drafts were subject to the acceptance agreement and therefore that the parol evidence rule excluded the introduction of evidence that they were not to be subject to the express terms of the written (printed) agreement.

Counsel next urge:

"(b) The officials of Richfield were ignorant of the use of acceptances and their mechanics."

Just how a recognition of the ignorance of the officials of Richfield could influence the judgment of this Court we confess our inability to understand, unless it be for the purpose of avoiding the damaging effect of the Lyons letter. (Defendant's Exhibit "A".) But the undisputed evidence does not support appellee's contention as to the ignorance of the officials of Richfield. There is no evidence that the use of acceptances was strange or unknown to Lyons or any

of the other officials of Richfield. It is true, as set forth in the quotation from the testimony appearing on page 18 of appellee's Petition, that Pope was sent to San Francisco to learn the *mechanics* of acceptance agreements, but to attribute to the officials of Richfield Oil Company ignorance regarding the substantial features of the transaction into which they were about to enter not only unjustly tars them with the brush of incompetency, but at best assumes something not in the record. Actually, Hall, with possibly a human desire to emphasize his importance in the transactions, stated on direct examination that it was *he* who suggested the use of acceptances. (R. 341.)

It is interesting to consider what possible success counsel for appellee may have in avoiding the effect of the Lyons letter on the grounds that the officials of Richfield were ignorant as to the nature of the transaction. Obviously counsel must get out from under the damaging effect of the word "shipment" as used in defendant's Exhibit "A". Lyons admittedly wrote the letter but counsel claim that Lyons was ignorant of the transaction. Yet, the record belies the charge of ignorance. Appellee's main witness, Hall, testified:

> "Upon returning to Los Angeles on the night of October 6th, I reported to Mr. McKee, the vice president of Richfield, *and Mr. Lyons, the Comptroller,* the result of my visit to San Francisco, and that this credit was in effect at San Francisco and ready for operation. I then returned to San Francisco and was entrusted with three letters and drafts and documents covering

> a shipment of goods to Birla Bros. at Calcutta, India. I brought the letter, Defendant's Exhibit 'A'. The change in the maturity date of acceptances from 120 days to 90 days on this letter is in my handwriting. I believe this change was made in the Wells Fargo Bank when I delivered the documents there." (R. 362.)

Not alone did Hall report to Lyons as to his visit to San Francisco and the arrangements for the credit, but he brought with him defendant's Exhibit "A" and changed the maturity date of the acceptances, as stated therein, from 120 to 90 days. He initialed the change but made no comment then or at any time as to the request in the letter "will you please release *against this shipment* $115,000 worth of acceptances * * *." In fact, in Hall's own language quoted above he stated that he returned with the letters, drafts and documents

> "covering a *shipment* of goods to Birla Bros."

and shortly thereafter testified with respect to the same transaction:

> "There would be four drafts, two on each *shipment* presented at that time under the acceptance agreement." (R. 362.)

Further in connection with this phase of the argument we respectfully call the Court's attention to pages 36 to 41 of our Brief on Appeal.

> Petitioner next argues:
>
> "(c) Both parties recognized and conceded that drafts, and drafts alone, constituted such security."

It is true that throughout the briefs counsel for both appellant and appellee presented to this Honorable Court the issue as to whether the drafts or the proceeds thereof were subject either to appellant's contractual lien under the acceptance agreement or to its banker's lien. At the time that the action was filed appellee's Ancillary Bill of Complaint referred to the *drafts* subject of this litigation and sought to compel the defendant bank to release such of the drafts as had not yet been collected and the proceeds of others thereof which had been collected. Subsequently appellee's Amended Ancillary Bill of Complaint sought recovery of the *proceeds,* all of the drafts having been collected. While the *drafts* were in the possession of the Bank or its correspondents they and the merchandise securing them were either security to the Bank pursuant to the terms of the acceptance agreements or subject to its banker's lien and right of set-off. Once the drafts were collected the *proceeds* thereof occupied the same legal position. Therefore, in pleadings, briefs and arguments the whole question before the Court was, first as to the drafts, and thereafter as to the proceeds being subject to the Bank's claim. That this was fully and properly recognized by the Court is evidenced by its statement at page 12 of the printed opinion:

> "We conclude that under the written acceptance agreements the Bank had a lien equivalent to a banker's lien upon the foreign bills of exchange covering the cargo of the 'Silver Ray' and 'Silver Hazel' and that under the law of California the Bank had a banker's lien upon the other two bills of exchange involved herein."

The Court considers and the exhibits and evidence sustain, but counsel for appellee carefully overlook, that had any of the drafts supported by shipping documents not been collected the Bank would have been compelled to realize on *shipments,* which were evidenced by shipping documents, particularly the bills of lading. The shipments constituted "goods" and "merchandise" and the bills of lading evidenced the goods and merchandise. None of the drafts, at the time of transmittal, were "clean paper" as referred to in the testimony of Mr. Gilstrap, heretofore quoted, in response to the hypothetical question as to what would have

> "happened had the 90 day drafts been paid and the 180 day drafts been unpaid." (R. 420.)

Counsel for appellee are in error in their statements, pages 21 to 28 of their Petition, that the parties were only considering drafts in determining the security for the acceptances. This error is obvious from a consideration of the numerous places in the record where shipments, shipping documents and bills of lading are referred to. Plaintiff's Exhibits 22, 23, 26, 27, 28 and 40 to 83 (R. 266, 268, 274, 275, 276, 277, 292 and 293) are the letters of transmittal which went

forward from Richfield to the Bank. These letters were in identical form to the letter of transmittal which appears on page 6 of the opinion. In every instance the heading of the letter shows the draft numbers, the drawers thereof and the ship. The body of each letter begins:

> "We are enclosing the following enumerated *documents covering shipment* going forward * * *."

Thereafter there is a description of the drafts, invoices, insurance policies and *bills of lading.* The drafts themselves (Plaintiff's Exhibits 22 and 23, R. 267 and 270) provide for release of "documents against acceptance", and contain the invoice number and the name of the ship. The acceptance register, Plaintiff's Exhibit 122, should likewise be considered (R. 394, et seq., 412, 413), in that it refers to the drafts, ships, merchandise and shipping documents. The letters of transmittal which went forward from appellant to its foreign correspondents (Defendant's Exhibit "F", R. 377 to 381, and Exhibit "G", R. 381) refer specifically to the shipping documents and on the copies retained by the Bank as its permanent records describe the Birla Bros'. shipments as "security for acceptances." The Lyons letter, Defendant's Exhibit "A", is a final link in the chain of documentary evidence that the security for the acceptances was *shipments* evidenced by *drafts* and *shipping documents.*

The record is replete with statements, both by plaintiff's witnesses and defendant's, wherein these ship-

ments are referred to interchangeably with drafts. See Pope's testimony with respect to defendant's Exhibit "A" (R. 316 and 317); Hall's testimony, page 362 and previously herein referred to, and Gilstrap's testimony:

> "Either Mr. Hall or Mr. Pope then stated that they were preparing a *shipment* to Birla Bros. I believe that in some previous conversation Mr. Hall had outlined to me in a general way the business that he did with Birla Bros. They stated that they wanted to raise as much money as possible against this particular *shipment,* and asked how much we would advance against the *shipment.*" (R. 374 and elsewhere on that page and on page 376.)

In the light of the foregoing it is impossible to give weight to petitioner's contention that the drafts alone constituted the security for the acceptances or to the complaint that appellee did not have a full opportunity, of which he availed himself with diligence and ability, to urge to the Court that the drafts should be separated, in legal consideration, from the shipping documents and shipments supporting them.

Simply stated, the logical sequence is this: the acceptances were issued on the security of "merchandise" and "goods", represented by bills of lading; the drafts were the evidence of the indebtedness owing from Richfield's foreign customers; when the merchandise and bills of lading were released, the drafts remained as security under the acceptance agreement. When the drafts were collected the proceeds were substituted.

Appellee further urges:

"(d) Bills of lading delivered to appellant merely as agent of appellee for delivery to consignee upon acceptance of drafts."

The answer to this contention is embodied in the foregoing consideration of subdivision (c) of Part II of appellee's Petition.

The fallacy in counsel's argument is in attempting to separate the drafts and the shipping documents. For example, counsel state and italicize for emphasis

> "None of the bills of lading were assigned by the Richfield Company to the Bank." (Petition page 29.)

Yet counsel will not deny that the bills of lading accompanied the drafts and occupied the same status. Counsel will not deny, and do not, that certain of the drafts were security for acceptances. Indeed, at page 28 of the Petition, it is stated:

> "While appellee contended that drafts were to constitute the security for the acceptances, his position was that under the agreement reached by the parties the short term drafts alone should constitute such security, the long term drafts being deposited merely for collection."

Yet, on the evidence introduced by appellee the mechanics of all transactions were the same. In every case the same form of letters of transmittal went forward to the Bank, accompanied by invoices and ship-

ping documents. (Plaintiff's Exhibits 22, 23, 26, 27, 28, 40 to 83, supra; R. 266, 268, 274, 275, 276, 277, 292 and 293.)

> **Counsel's final argument under point II of their Petition is that**
>
> **"(e) The so-called Lyons' letter (Defs. Ex. A) is lacking in evidentiary or controlling value."**

It has been incomprehensible to defendant and appellant throughout the trial, appeal and petition for rehearing in this case, that counsel for petitioner seek on the one hand to interpret the contract between Richfield and the Bank by constant reference to statements contained in correspondence emanating from the Bank, and on the other hand to deny evidentiary value or any effect to the all-important letter written at the time when the transaction was first consummated by the Comptroller of Richfield Oil Company, the so-called Lyons letter, defendant's Exhibit "A". As this Honorable Court has stated (Opinion p. 7) the proposed acceptance agreement still remained in the nature of an offer from the Bank to Richfield until the acceptance thereof on October 8, 1930, by the delivery of the transmittal letters dated October 7th, the drafts and shipping documents therein described, the Lyons letter of October 7th requesting the issuance of $115,000.00 worth of acceptances against the shipments, and the acceptance by the Bank thereafter of the nine drafts for $115,000.00. Counsel's efforts to

waive aside the effect of the Lyons letter and at the same time to hold the Bank accountable for every word appearing in any of its correspondence may be commendable in the interests of their client, but hardly proper as an attack upon this Court's decision. How counsel can hold the Lyons letter as "entirely unnecessary" is difficult to understand, in view of the fact that it was the letter which announced the consent by Richfield to the acceptance agreement and the request for the acceptance by the Bank of the first $115,000.00 of drafts to be issued thereunder.

This Court is told in the Petition for Rehearing that the transaction had been negotiated exclusively by Hall and Pope and that Lyons at no time participated therein and was ignorant of the transaction and the nature thereof. We have herein previously stated (supported by reference to the record) that Lyons, the Comptroller and financial official of the Company, was advised by Hall upon his return from San Francisco, of the nature of the transaction. We have likewise hereinbefore noted that Hall himself, the so-called negotiator of the transaction, delivered the Lyons letter, knew its contents and even went so far as to change in his handwriting the reference therein of 120, to 90 days, initialing the change. If Lyons was ignorant of the transaction we must assume that it was the type of ignorance which now makes it "folly to be wise".

Further in excuse of the language of the letter we are told that Richfield was in dire need of funds and Lyons was interested in getting the money quickly;

that if Hall had not come to San Francisco the letter would never have been sent; that subsequent letters written by Lyons indicated his truer understanding of the agreement; that the transaction was consummated at the time the letter was received and needed no further communications between the parties. (Yet immediately thereafter counsel argue that parol evidence was admissible at all times to identify the subject matter of the contract.)

Without burdening the Court with too minute a reply to these arguments, which more or less defeat themselves in their statement, it should be noted that the record is silent as to Richfield's need of funds or that the Bank knew of Richfield's having any need of funds, or that for any reason the Lyons letter should not be interpreted as it was written, namely, as the final act of acceptance of the proposed contract for the financing of Richfield's foreign transactions, written by the financial official of the Company, delivered and corrected by Hall, the head of the Foreign Department and the negotiator of the transaction; that the letter requested the acceptance of the first drafts under the new agreement, $115,000.00 against two Birla Bros. shipments, the drafts and shipping documents with reference thereto being delivered contemporaneously. To avoid the reference to "shipment" in this letter counsel state at page 33 of their Petition, that the evidence of all witnesses shows that the agreement relates to drafts and nothing else. We have previously referred to the Record, exhibits and testimony to establish the fact that the word "ship-

ment'' was used throughout and that as stated by this Court in its opinion:

> ''the foreign bills of exchange * * * were intended as a means of acquiring possession of the proceeds derived from the sale of the goods and substituting those proceeds for the goods themselves.'' (pp. 8 and 9.)

In closing this phase of our answer we respectfully desire to mention that the effect of the Lyons letter was presented at considerable length in our brief on appeal, pages 36 to 42, and answered to the fullest extent possible under the circumstances by very able counsel in appellee's brief, pages 91 to 97.

In concluding point II petitioner states that if by parol evidence it could be proved that the bills of lading constituted security under the acceptance agreement, it is inconceivable why by the same character of evidence it could not be proved that the drafts, or some of them, were to constitute such security in lieu of the bills of lading. This statement, we sincerely believe, is typical of the attempt by petitioner to confuse the issue before this Court by over-emphasizing the distinction between drafts and bills of lading. The drafts were in all instances accompanied by shipping documents and bills of lading which were to be released only against payment of the sight drafts and acceptance of the time drafts. The drafts were the means of acquiring possession of the proceeds derived from the sale of the goods which during the

shipment were represented by the bills of lading. To state, as counsel do, that appellee has not been given a full opportunity to show the subject matter of the contract is unfair to this Court in view specifically of its statement at page 2 of the opinion that:

> "The appellee correctly contends that the written agreements must be construed according to their terms and that these terms are conclusive as to the agreement between the parties, *but that the references therein to drafts and other documents may be explained by parol evidence.*" (Italics ours.)

APPELLEE'S DILEMMA.

These two first points urged by appellee in his Petition for Rehearing and which have, in the foregoing pages, been answered by us in detail, fail of their purpose of establishing appellee's right to a rehearing for an even simpler and more obvious reason than any of those heretofore advanced by us. If this Court were to grant a rehearing and to permit appellee to argue at length on these first two points, the utmost which appellee could accomplish would be to persuade this Court that it was in error in holding that the proceeds of the two Birla Bros. 180-day drafts were pledged as security not alone for the indebtedness of the acceptances but for

> "any other indebtedness due from Richfield Oil Company to the Bank, past, present and future" (Opinion p. 9.)

But if appellee is successful in persuading the Court that it was in error in its holding as to the 180-day

drafts, the sole result accomplished would be to place the proceeds of these drafts in exactly the same category as the proceeds of the Ricardo Velasquez draft in the amount of $1245.11 and the third Birla Bros. draft in the amount of $23,352.08. We stated repeatedly, both before the trial Court and on appeal, that defendant and appellant had been throughout confronted with a dilemma:

> "The drafts, the proceeds of which are the subject of this litigation, were either deposited under the acceptance agreement or they were not. If under the agreement, its language to the effect that they are security not alone for the acceptances issued thereunder, but likewise for 'any other liabilities from us (Richfield) to you (bank), whether then existing or thereafter contracted,' is controlling. The evidence is overwhelming that the drafts were deposited under the agreement." (Appellant's Brief pp. 166, 167.)
>
> * * * * * * *
>
> "But if, despite all this, it is believed that the drafts here in question were not deposited under the acceptance agreement, none the less, they are all subject to appellant's banker's lien or right of set-off." (Appellant's Brief p. 169.)

This Honorable Court has held that the proceeds of the two 180-day Birla Bros. drafts were subject to the acceptance agreement, but that the proceeds of the other two drafts in litigation were not under the acceptance agreement. As stated by the Court at page 9 of its opinion:

> "Moreover, we have examined the oral evidence concerning the arrangement between the parties and find nothing threin justifying the conclusion

> that the bank intended to waive its banker's lien upon the foreign bills of exchange deposited with it by the Richfield Oil Company, as we will now point out in connection with the two other bills of exchange involved in this appeal."

After considering these two other bills of exchange and the evidence with respect to them and related drafts, the Court states at page 12 of the decision:

> "We conclude that under the written acceptance agreements the bank had a lien equivalent to banker's lien upon the foreign bills of exchange covering the cargo of the 'Silver Ray' and 'Silver Hazel' and that under the law of California the bank had a banker's lien upon the other two bills of exchange involved herein."

It is pertinent to ask therefore: What will it avail appellee if this Court agrees, in their entirety, with the arguments propounded in appellee's points I and II, grants a rehearing and even modifies its opinion to hold that the proceeds of these two 180-day drafts were not subject to the acceptance agreement? Appellee will forthwith be impaled upon the other horn of the dilemma, that the 180-day drafts and their proceeds must be considered in the same manner as the draft of Ricardo Velasquez and the third draft of Birla Bros., and therefore subject to a banker's lien. What does this avail appellee? Only that appellant is entitled to keep the proceeds on the theory of banker's lien as recognized by the Court, instead of on the theory of a contractual lien. How, therefore, can a further hearing benefit appellee if the sole possible result of such a hearing would be to permit him to

establish that while he is entitled to recover the draft proceeds on one theory nonetheless the Bank is entitled to retain them on another?

Of course, it is needless to state that we do not for a moment admit that there was any error in the Court's decision that the 180-day drafts were subject to the acceptance agreement. We urged, but this Court did not agree, that all of the drafts, including the Ricardo Velasquez draft and the third Birla Bros. draft, were subject to the acceptance agreement. In view of the evidence surrounding the delivery of the 180-day drafts, including particularly the Lyons' letter, a different consideration of these particular drafts, as determined by this Court, is entirely tenable.

In the foregoing argument we stated advisedly that it would avail appellee nothing to have a rehearing granted because the utmost he could hope for would be a recession by the Court from its position that the 180-day drafts were subject to the acceptance agreement, with the consequent necessary determination by the Court that they were subject instead to appellant's banker's lien. We made this statement advisedly because, in all sincerity, we believe that the succeeding two points urged by appellee, namely, (1) that the foreign collections should be deemed separate and apart from other business of Richfield and not subject to banker's lien, and (2) that the appellant subsequently waived its banker's lien, present no arguments which were not advanced in appellee's brief on appeal and on oral argument and fully considered by the Court in its decision. However, in substantiating this statement we will briefly consider these last two points.

III.

AS HIS THIRD POINT APPELLEE ARGUES:

"III.

IT IS DEFINITELY PROVED THAT ALL FOREIGN COLLECTIONS SHOULD BE DEEMED TO BE SEPARATE AND APART FROM OTHER BUSINESS OF RICHFIELD WITH AND ITS FINANCIAL OBLIGATIONS TO APPELLANT BANK."

Counsel attack, particularly, the language of the Court at pages 11 and 12 of the Opinion and quote the same at length. However, in their criticism of the Court's conclusion that the separation of the accounts did not operate as a waiver of banker's lien, counsel neglect to comment upon the cases cited in the opinion, particularly:

American Surety Company v. Bank of Italy (1923), 63 Cal. App. 149,

which, as set forth in our Brief on Appeal (pp. 91 to 95), presents such a strong analogy to this phase of the instant matter.

We submit that this Honorable Court has not, as counsel suggest, based its decision on a misconception of the evidence with respect to the so-called Hall-Pope agreement or a misunderstanding of appellee's position as to the application of this agreement to the two types of drafts. The Court has sustained in this connection the position of appellant, argued in our Brief on Appeal from pages 74 to 110, that to the extent that drafts were not deposited under the acceptance agreement they were subject to defendant's

banker's lien and right of set-off, even though the conclusion of the trial Court that Hall directed the Bank to keep the transactions of the Foreign Department separate and apart from the other transactions of Richfield and the Bank, be accepted as true.

It should be noted that in accepting this conclusion of the trial Court this Appellate Court has given the fullest recognition required by the authorities cited at the beginning of this Answer to the findings of the trial Court. In other words, it is not incumbent upon the appeal tribunal to draw the same inferences and conclusions of law from the findings of fact as the trial Court did, but only to give recognition to its factual conclusions upon conflicts in testimony.

> **In this phase of counsel's attack upon the court's opinion, they urge:**
>
> **"(a) Appellee does not claim that any distinction was made between the two types of drafts in the so-called Hall-Pope agreement."**

When appellee argues that the so-called agreement to "keep separate and apart" applied to all foreign collections we submit that he is taking an illogical position which must necessarily be fatal to him. The Court has recognized this, particularly at pages 8 and 9 of the opinion, wherein it is emphasized that the agreement to keep separate and apart, assuming that it did exist, was an oral agreement and was in direct conflict with the express language of the written ac-

ceptance agreement. As appellee must and does admit, at least *some* drafts were under the acceptance agreement and subject to its terms. If the subject matter of the oral agreement was, as counsel contend, applicable to *all* drafts, it is in fact in conflict with the written terms of the acceptance agreement; evidence of such oral agreement is therefore, on appellee's own theory, inadmissible under the parol evidence rule.

Throughout the trial we objected to the introduction of any evidence as to the purported agreement negotiated by Hall to keep the Foreign Department transactions separate and apart. (R. 264.)

Appellee insists that the so-called Hall-Pope agreement

> "related to and embraced *all* of Richfield's foreign business with appellant bank."

Appellee is however forced to admit that the Bank had a right to apply against any other indebtedness owing to it from Richfield the proceeds of any drafts deposited under the acceptance agreement, notwithstanding the so-called Hall-Pope agreement. Where, however, the acceptance agreement did not apply, on appellee's theory, the Hall-Pope agreement came into effect. The extent to which able counsel must go to bring these two agreements into some form of consistency is extremely interesting. Analyzed it is this: that there was an agreement between the Bank and Richfield for all of the Foreign Department transactions providing that they were to be kept separate and apart from other transactions, but that within this

larger circle of all transactions there was, at the same time and negotiated by the same parties, another agreement whereby certain of the Foreign Department transactions were, by virtue of the operation of the acceptance agreement, expressly subjected to any other indebtedness of Richfield to the Bank. That such conflicting transactions could not have been entered into by reasonably thinking business persons is obvious. Taking a position, as the Court did, most liberal to appellee, the conclusion is inevitable: that if the Hall-Pope agreement is applied to *all* of the drafts it is in conflict with the written acceptance agreement, but if it applies only to those drafts which were not deposited under the acceptance agreement its legal effect may then be properly considered, and is that the transactions of the departments were to be kept separate without however any express or implied waiver of banker's lien.

It should be noted in passing that counsel contend that the acceptance form of transaction was entered into upon the initiative of the Bank (appellee apparently seeking thereby to explain the conflict between the written and oral agreements). As a matter of fact, Hall himself claimed to have suggested this form of transaction. He stated on direct examination

> "Then *I* brought up the subject of the use of acceptances." (R. 341.)

and on cross-examination

> "At this conversation I believe *I* brought up the question of acceptances, and told Mr. Gilstrap I thought it was the best way of handling the Richfield Oil Company's business." (R. 354.)

> Appellee next urges that
>
> "(b) The agreement between Hall and appellant officials that all drafts and their proceeds should be deemed to be separate and apart from other business of Richfield with and its financial obligations to appellant constituted such drafts and proceeds a special fund and a deposit against which no banker's lien or right of set-off existed."

In this phase of his argument appellee restates a very substantial part of his Brief on Appeal. (pp. 13 to 25 and 139 to 156.) Inasmuch as appellant in its Brief went into this matter at considerable length (pp. 74 to 110) we hesitate to again burden the Court with further comment. We desire to emphasize, however, that our argument accepts the truth of Hall's statement and gives full recognition to the trial Court's finding of fact, that he urged upon the bank officials that the transactions of the Foreign Department were to be kept separate from the other transactions of Richfield. In other words, he, having apparently an interest, as this Court recognized, in commissions, desired that for reasons of convenience or otherwise the accounts be kept separate. This does not, as we emphasized in our Brief, amount to an agreement waiving a lien, either as a matter of fact or as a matter of law. The very knowledge of Hall and the other officials of Richfield, and which counsel emphasize at page 44 of their Petition, as to

the existence of a banker's lien and right of set-off, defeats any attempt to imply such agreement from general language to keep a transaction separate and apart. If a lien or right of set-off was to be waived the waiver should have been in express terms. This is a matter of common sense. It is more than that—it is required by the law as noted in the cases cited by this Court and in those set forth on pages 91 et seq. of our Brief on Appeal. We desire to further emphasize in passing that appellee assumes in his Petition some facts which are not in evidence, namely, as to the financial condition of Richfield and its action in view of that condition. The only evidence as to Richfield's financial wants is a single statement by Hall that he knew at the time that the Company was pressed for ready cash. (R. 341.) On the other hand, the Bank had, in July of the same year, renewed the Richfield loan and had increased it by $125,000.00. The evidence indicates that the Bank thought Richfield's financial condition satisfactory. If, however, as counsel contend, Richfield was known by its officials to be tottering on the brink of economic disaster, and the foreign collections were part of its "life blood", and if by the same token Hall and the other officials, knowing of the bank's right of lien and set-off, and fearing it, wanted some assurance that the Bank would take no action to enforce such lien or right of set-off, why was not the so-called agreement *express* upon that point? Instead only, as Mr. Hall testified, that

> "any transactions were to be considered separate from other transactions of the Richfield * * *" (R. 340.)

The answer is quite obvious:

Neither Mr. Hall nor the officials of Richfield intended an agreement to waive any of the bank's rights of lien but desired the transactions kept separate. We may assume grave doubts as to whether this or any other bank, dealing in the future, would have waived its banker's lien or right of set-off, especially if it knew, as appellee suggests, of its debtor's precarious financial status. Furthermore, we may well doubt whether any practical benefits to Richfield would have resulted from a waiver of lien if we bear in mind that even without a lien or right of set-off the Bank might have commenced an action on the general indebtedness when the same became due and attached or garnisheed the foreign collections.

In concluding this argument we desire again to emphasize that this Honorable Court has given full and complete recognition to the findings of fact of the trial Court, ignoring only, as is proper, its erroneous inferences and conclusions unjustified in law.

IV.

AS HIS FINAL CONTENTION APPELLEE URGES:

"IV.

APPELLANT BANK WAIVED ITS BANKER'S LIEN AND RIGHT OF SET-OFF AS AGAINST ALL COLLECTIONS OF RICHFIELD EXCEPTING THOSE SPECIFICALLY DEPOSITED UNDER THE ACCEPTANCE AGREEMENTS."

As reluctant as we were to unduly burden this Court with an over-lengthy reply to the other points urged in the Petition for Rehearing, still more reluctant are we to again answer this final argument at unnecessary length.

The Court in its opinion considered fairly and fully all of the points urged by appellee on the appeal. Pages 12 to 17 consider particularly the question as to the waiver by appellant, by word or conduct, of its right to apply the proceeds of the drafts herein in question either under its contractual or banker's lien. This Court considered the Receiver's request for the restoration of the cash balances, the bank's response and its action thereon; it considered the language of the telegram of the Bank wherein it reserved its right of lien against the collections which were security for acceptances and its right to banker's lien. It places the only possible reasonable interpretation upon the exchange of letters and telegrams: that the Bank was willing to restore to the Receiver the full cash balance and did restore initially in excess of $40,000.00. The Court noted, as

we suggested in extenso in our Brief on Appeal, that the Receiver was requesting a restoration of the "cash balances", and that the appellant Bank complied with this request but as a matter of precaution informed the Receiver in its telegraphic response that it was reserving its rights against the foreign collections. As the Court properly states, if we take the Receiver's telegram by its four corners, it obviously refers to the restoration of the checking account in the Bank so that the Receiver would stand in the shoes of the Richfield Oil Company. The reply is, "We are willing to restore balance in checking account". This was an acceptance of the Receiver's proposal subject to similar action by other banks.

As to the reserved rights, the Court concluded that with respect to the 180-day drafts, the Bank expressly reserved its rights to them (being under the acceptance agreement) irrespective of whether it was obligated by law so to do. With respect to the proceeds of the remaining drafts subject of this litigation, the Bank reserved in its telegram, if construed with "technical nicety", its "banker's lien on these collections" or, if the telegram is construed from a "broader view", it did not include them within the checking account which it had been requested to restore.

The Court thereafter considered the effect of the Bank's conduct in subsequently returning to the Receiver additional sums and in filing its claim in the receivership proceedings. From all of this it is properly concluded that there was neither in law or in fact a waiver by the Bank nor was there any estoppel

upon it to assert thereafter its proper legal rights. The opinion itself presents the best and most decisive answer to appellee's contentions.

We could be more detailed in our reply to each of the statements made by counsel at pages 51 to 65 of the Petition, but in view of the language of the opinion see no purpose in so doing. However, we again call to the attention of this Court that counsel's assumption that the appeal Court is bound by the findings of the lower Court as to the *effect* of the telegraphic exchange or conduct of the bank, is in conflict with the cases cited in the earlier part of this answer.

We likewise feel obliged to comment upon appellee's citation from the opinion of the Court at page 17 as to the subsequent conduct of the other banks. In criticising the Court's conclusion counsel emphasize the statement that

> "Their conduct was not brought home to the appellant and is of no significance whatever * * *"

and completely ignore the Court's subsequent language:

> "* * * even if brought to the attention of the bank after the transaction was closed would be without significance. * * *"

In other words, just as counsel could obtain small comfort from a reconsideration by this Court of its determination that the 180-day Birla Bros. drafts were subject to the acceptance agreement because even if they were not they were still subject to appellant's

banker's lien and right of set-off, so here counsel could obtain equally little comfort from a reconsideration by this Court as to whether the subsequent conduct of the other banks was brought home to the appellant because, even if brought home, it would be without significance.

But a reconsideration is, we submit, not necessary. While it would be presumptuous upon our part to remark that the Court's opinion is sound and well reasoned, we cannot refrain from stating in concluding this brief, that on few occasions do counsel on both sides experience the satisfaction of having an appeal Court, in its decision, review the voluminous evidence and the extensive arguments with such care and thoroughness as in the instant matter.

We submit, therefore, that the petition for a rehearing should be denied.

Dated, San Francisco,
August 15, 1934.

Respectfully submitted,
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No. 7366

United States

Circuit Court of Appeals

For the Ninth Circuit.

CANADIAN PACIFIC RAILWAY COMPANY,
a Foreign Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Parker Printing Company, 545 Sansome Street, San Francisco.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of Washington, Northern Division.

No. 20730

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY,
a foreign corporation,
Defendant.

COMPLAINT.

The plaintiff, the United States of America, respectfully shows to this Honorable Court as follows:

I.

That the plaintiff, the United States of America, is a corporation sovereign.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

II.

That the defendant is a foreign corporation engaged in the railway and steamship business, operating in particular a fleet of passenger boats between Canadian ports and American ports in the Puget Sound area for several years last past, including all times mentioned in other paragraphs of this complaint, including among others the following steamships, to-wit: The Princess Louise, Princess Charlotte, Princess Marguerite, Princess Kathleen, Princess Patricia, and the Nootka.

III.

That there was enacted by the 71st Congress of the United States an Act providing for extra compensation for overtime service performed by Immigrant Inspectors and other employees of the Immigration Service in particular as fol- [2] lows, to-wit:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Labor shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or

other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Secretary of Labor is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed.

Sec. 2. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving in the United States from a foreign port to the Secretary of Labor, who shall pay the same to the several immigration officers and employees entitled thereto as provided in this Act. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual

inspection or examination of passengers or crew takes place or not; Provided, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules.

Approved, March 2, 1931.

IV.

That pursuant to said authority vested in law, the Immigration Service in the Western District of Washington and British Columbia earned for overtime service in connec- [3] tion with the operation of defendant's steamers from May 1, 1931, to September 30, 1932, inclusive, a total balance of Four Thousand Three Hundred Thirty-one and 13/100 ($4331.13) Dollars, as set forth in Exhibit "A" which is attached hereto and by reference made a part hereof.

V.

That damage has been made upon this defendant for the bills as rendered from time to time and in the various totals as they have accumulated from time to time, and at all times defendant has refused to settle and pay said account or any part thereof.

WHEREFORE, plaintiff prays for judgment in the amount of Four Thousand Three Hundred Thirty-one and 13/100 ($4331.13) Dollars, together

with costs and for such other and further relief as to the Court may seem proper in the premises.

WILLIAM D. MITCHELL
Attorney General of the United States
By ANTHONY SAVAGE
United States Attorney
HAMLET P. DODD
Assistant United States Attorney [4]

20730 Ptffs. } Admitted on written stipulation.

EXHIBIT "A"

STATEMENT OF OVERTIME SERVICES RENDERED TO THE CANADIAN PACIFIC RAILWAY COMPANY
in the examination of passengers and crews of its steamers listed below.

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-016 2-10-32		PRINCESS LOUISE at Seattle, Washington			
5-25-31	8p	10p	$ 7.50	PR$ 3.75	Charles W. Durkee Jr.
		TOTAL		$ 3.75	
Bill No. 28-022 2-10-32		PRINCESS CHARLOTTE at Seattle, Wash.,			
5-13-31	8p	10p	$ 7.50	$ 3.75	Roy M. Porter
5-17-31	8p	10p	7.50	3.75	Walter P. Harris
		TOTAL		$ 7.50	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-023 2-10-32		PRINCESS MARGUERITE at Seattle, Wash.,			
5- 3-31	7.15a	9.15a	$ 6.94	$13.88	P. G. Hall
5-10-31	7.15a	9.15a	6.94	13.88	Emerson E. David
5-17-31	7.15a	9.15a	6.94	13.88	S. G. Nelson
5-17-31	7.15a	9.15a	6.94	13.88	Ira L. Hazleton
5-24-31	8p	10p	6.94	6.94	S. G. Nelson
		TOTAL		$62.46	
Bill No. 28-024 2-10-32		PRINCESS KATHLEEN at Seattle, Wash.,			
5-30-31	7.15a	9.15a	$ 6.94	$13.88	Emerson E. David
5-30-31	7.15a	9.15a	7.50	15.00	Walter P. Harris
5-24-31	7.15a	9.15a	6.94	13.88	P. G. Hall
5-31-31	7.15a	9.15a	6.94	13.88	Emerson E. David
		TOTAL		$56.64	
Bill No. 28-038 2-24-32		PRINCESS MARGUERITE At Seattle, Wash.			
6- 7-31	7.15a	9.15a	$ 6.39	$12.78	Leonard I. Cornell
6-10-31	8.30p	10.00p	7.50	3.75	Roy M. Porter
6-28-31	7.15a	9.15a	6.94	PR 6.94	Howard E. Norwood
6-29-31	8.00p	9.30p	7.50	3.75	Charles W. Durkee Jr.
		TOTAL		$27.22	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-039 2-23-32		PRINCESS KATHLEEN At Seattle, Wash.,			
6- 7-31	7.15a	9.15a	$ 7.50	PR$ 7.50	John P. Boyd Sr.
6-14-31	7.15a	9.15a	6.94	PR 6.94	Purley G. Hall
6-14-31	7.15a	9.15a	9.72	PR 9.72	Bela E. Gowen
6-21-31	7.15a	9.15a	8.89	PR 5.93	Thomas W. Lynch
6-21-31	7.15a	9.15a	7.50	PR 7.50	Arba D. H. Jackson
6-28-31	7.15a	9.15a	7.50	PR 5.00	Louis M. Persons
		TOTAL		$42.59	[6]
Bill No. 28-062 2-25-32		NOOTKA at Seattle, Wash. *Stricken by stipulation—Paid*			
7-23-31	7.30p	8.30p	$ 7.50	$ 3.75	Charles W. Durkee J.
		TOTAL		$ 3.75	
Bill No. 28-063 2-25-32		PRINCESS KATHLEEN at Seattle, Wash.			
7- 4-31	7.15a	9.15a	$ 8.33	PR$ 8.33	James P. Sanderson
7- 4-31	7.15a	9.15a	7.50	PR 7.50	Herman F. Schwandt
7- 5-31	7.15a	9.15a	7.50	PR 7.50	John P. Boyd Jr.
7- 5-31	7.15a	9.15a	9.72	PR 6.48	Joseph E. Spengler
7-12-31	7.15a	9.15a	6.94	PR 6.94	Emerson E. David
7-12-31	7.15a	9.15a	7.50	PR 7.50	Charles W. Durkee Jr.
7-19-31	7.15a	9.15a	6.94	PR 6.94	Ira L. Hazleton
7-26-31	7.15a	9.15a	7.50	PR 7.50	Roy C. Matterson
7-26-31	7.15a	9.15a	6.94	PR 3.47	Sigvald G. Nelson
		TOTAL		$62.16	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28–063A 2–25–32		PRINCESS PATRICIA at Seattle, Wash. *Stricken by stipulation—Paid*				
7– 4–31	7.00a	8.00a	$ 7.50		$ 3.75	Herman F. Schwandt
7– 4–31	10.00p	12.00MN	$ 7.50		$ 3.75	Herman F. Schwandt
7– 4–31	10.00p	11.15p	8.33		4.16	James P. Sanderson
		TOTAL			$11.66	
Bill No. 28–064 2–25–32		PRINCESS MARGUERITE at Seattle, Wash.				
7– 5–31	7.30p	8.45p	$ 9.72		$ 4.86	Joseph E. Spengler
7–19–31	7.15a	9.15a	7.50	PR	7.50	Walter P. Harris
7–28–31	5.00p	12.00MN	7.50	PR	5.00	Charles W. Durkee Jr.
		TOTAL			$17.36	
Bill No. 28–097 3–2–32		PRINCESS KATHLEEN at Seattle, Wash.				
8– 2–31	7.15a	9.15a	$ 7.50		$15.00	Roy M. Porter
8– 2–31	7.15a	9.15a	7.50		15.00	John H. Zumwalt
8– 9–31	7.15a	9.15a	5.83		11.66	Ray S. Steele
8–16–31	7.15a	9.15a	6.39		12.78	Leonard I. Cornell
8–16–31	7.15a	9.15a	833.	PR	8.33	John P. Boyd Sr.
8–23–31	7.15a	9.15a	6.94		13.88	Purley G. Hall
8–23–31	7.15a	9.15a	9.72	PR	14.58	Bela E. Gowen
8–30–31	7.15a	9.15a	7.50	PR	7.50	Arba D. H. Jackson
8–30–31	7.15a	9.15a	8.89		17.78	Thomas W. Lynch
		TOTAL			$116.51	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-0122 3-4-32		PRINCESS KATHLEEN at Seattle, Wash.			
8- 9-31	7.15a	9.15a	$ 8.33	$16.66	Alfred P. Smith
(Supplemental to Bill No. 28-097)					
		TOTAL		$16.66	

[7]

Bill No. 28-098 3-2-32		PRINCESS KATHLEEN at Vancouver, B.C.			
8-13-31	9.30p	12.00p	$ 6.94	$ 3.47	John C. Bailey
8-20-31	9.30p	12.00p	7.50	3.75	John A. Wallman
8-27-31	9.30p	12.00p	6.94	3.47	Alpheus M. Illman
		TOTAL		$10.69	

Bill No. 28-0134 3-7-32		PRINCESS MARGUERITE at Seattle, Wash.			
9-14-31	7.45p	10.00p	$ 8.33	$ 4.16	James P. Sanderson
9-14-31	7.45p	10.00p	8.33	4.16	John P. Boyd Sr.
		TOTAL		$ 8.32	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-0135 3-7-32			PRINCESS KATHLEEN at Seattle, Wash.		
9- 6-31	7.15a	9.15a	$ 7.50	PR$ 7.50	Howard E. Norwood
9- 6-31	7.15a	9.15a	7.50	PR 7.50	L. M. Persons
9- 7-31	7.15a	9.15a	7.50	PR 7.50	Charles W. Durkee Jr.
9- 7-31	7.15a	9.15a	8.33	16.66	Alfred P. Smith
9-13-31	7.15a	9.15a	7.50	15.00	John P. Boyd Jr.
9-13-31	7.15a	9.15a	9.72	PR 6.48	Bela E. Gowen
9-20-31	7.15a	9.15a	7.50	15.00	Herman F. Schwandt
9-20-31	7.15a	9.15a	8.33	16.66	John P. Boyd Sr.
9-27-31	7.15a	9.15a	9.72	19.44	Joseph E. Spengler
		TOTAL		$111.74	
Bill No. 28-0147 3-7-32			PRINCESS KATHLEEN at Vancouver, B.C.		
9- 3-31	9.30p	11.50p	$ 7.50	$ 3.75	Henry T. Rowbottom
9-10-31	9.30p	12.00p	6.94	3.47	Alpheus M. Illman
9-17-31	9.30p	11.45p	7.50	3.75	John A. Wallman
9-24-31	9.30p	11.45p	6.94	3.47	Walter E. Ainsley
		TOTAL		$14.44	
Bill No. 28-0149 3-7-32			PRINCESS CHARLOTTE at Tacoma, Wash. *Stricken by stipulation—Paid*		
9- 8-31	12.01a	1.30a	$ 8.33	$ 4.16	Alfred Voligny
		TOTAL		$ 4.16	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No.			NOOTKA			
28-0151			at Tacoma, Wash.			
3-7-32			*Stricken by stipulation—Paid*			
9- 6-31	10.00a	11.00a	$ 6.94	PR	$ 6.94	Wm. G. McNamara
		TOTAL			$ 6.94	[8]
Bill No.			PRINCESS KATHLEEN			
28-0159			at Seattle, Wash.			
3-11-32						
10- 4-31	7.15a	9.15a	$ 7.50		$15.00	Howard E. Norwood
10- 4-31	7.15a	9.15a	8.33		16.66	James P. Sanderson
10-11-31	7.15a	9.15a	6.94		13.88	Sigvald G. Nelson
10-11-31	7.15a	9.15a	7.50	PR	7.50	Herman F. Schwandt
10-18-31	7.15a	9.15a	7.50	PR	7.50	Charles W. Durkee Jr.
10-18-31	7.15a	9.15a	9.72	PR	6.48	Joseph E. Spengler
10-25-31	7.15a	9.15a	6.94	PR	6.94	Emerson E. David
10-25-31	7.15a	9.15a	7.50		15.00	John P. Boyd Jr.
		TOTAL			$88.96	
Bill No.			PRINCESS MARGUERITE			
28-0160			at Seattle, Wash.			
3-11-32						
10- 1-31	8.30p	10.30p	$ 7.50		$ 3.75	Charles W. Durkee Jr.
10-25-31	8.30p	10.30p	9.72		4.86	Bela E. Gowen
		TOTAL			$ 8.61	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-0162 3-11-32		PRINCESS KATHLEEN at Vancouver, B.C.			
10- 1-31	9.30p	12.00p	$ 6.94	$ 3.47	Alpheus M. Illman
10- 5-31	9.30p	12.00p	6.94	3.47	John C. Bailey
10- 8-31	9.30p	12.00p	7.50	3.75	Henry T. Rowbottom
10-15-31	9.30p	11.45p	6.94	3.47	John C. Bailey
10-22-31	9.30p	11.45p	5.83	2.91	Richard Montfort
10-29-31	9.30p	12.15a	7.50	3.75	John A. Wallman
		TOTAL		$20.82	
Bill No. 28-0184 3-14-32		PRINCESS KATHLEEN at Seattle, Wash.			
11- 1-31	7.15a	9.15a	$ 7.50	$15.00	Walter P. Harris
11- 1-31	7.15a	9.15a	6.94	13.88	Ira L. Hazleton
11- 8-31	7.15a	9.15a	6.94	13.88	Sigvald G. Nelson
11- 8-31	7.15a	9.15a	7.50	15.00	Roy C. Matterson
11-15-31	7.15a	9.15a	8.33	PR 8.33	James P. Sanderson
11-15-31	7.15a	9.15a	7.50	15.00	Roy M. Porter
11-22-31	7.15a	9.15a	9.72	PR 9.72	Joseph E. Spengler
11-22-31	7.15a	9.15a	5.83	11.66	Ray S. Steele
11-26-31	7.15a	9.15a	6.94	13.88	Leonard I. Cornell
11-26-31	7.15a	9.15a	6.94	PR 6.94	Emerson E. David
11-29-31	7.15a	9.15a	6.94	13.88	Purley G. Hall
11-29-31	7.15a	9.15a	7.50	PR 7.50	Walter P. Harris
		TOTAL		$144.67	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28-0185 3-14-32			PRINCESS MARGUERITE at Seattle, Wash.			
11- 5-31	8.30p	10.30p	$ 7.50		$ 3.75	Charles W. Durkee Jr.
11-20-31	8.30p	10.30p	6.94		3.47	Sigvald G. Nelson
		TOTAL			$ 7.22	[9]
Bill No. 28-0187 3-14-32			PRINCESS KATHLEEN at Vancouver, B.C.			
11- 5-31	9.30p	11.45p	$ 7.50		$ 3.75	Henry T. Rowbottom
11-12-31	9.30p	11.45p	6.94		3.47	John C. Bailey
11-19-31	9.30p	11.30p	6.94		3.47	Walter E. Ainsley
		TOTAL			$10.69	
Bill No. 28-0202 3-16-32			PRINCESS KATHLEEN at Seattle, Wash.			
12- 6-31	7.15a	9.15a	$ 8.89		$17.78	Thomas W. Lynch
12- 6-31	7.15a	9.15a	7.50		15.00	Roy C. Matterson
12-13-31	7.15a	9.15a	7.50		15.00	Roy M. Porter
12-13-31	7.15a	9.15a	7.50	PR	7.50	Louis M. Persons
12-20-31	7.15a	9.15a	8.33		16.66	Alfred P. Smith
12-20-31	7.15a	9.15a	5.83	PR	5.83	Ray S. Steele
12-25-31	7.15a	9.15a	8.33		16.66	John P. Boyd Sr.
12-25-31	7.15a	9.15a	7.50	PR	7.50	Arba D. H. Jackson
12-27-31	7.15a	9.15a	6.94		13.88	Purley G. Hall
12-27-31	7.15a	9.15a	9.72	PR	9.72	Bela E. Gowen
		TOTAL			$125.53	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-0208 3-16-32	PRINCESS KATHLEEN at Vancouver, B.C.				
12- 3-31	9.30p	11.30p	$ 5.83	$ 2.91	Richard Montfort
12- 9-31	9.30p	11.45p	7.50	3.75	Henry T. Rowbottom
12-16-31	9.30p	11.45p	6.94	3.47	Alpheus M. Illman
12-17-31	9.30p	11.30p	7.50	3.75	John A. Wallman
12-23-31	9.30p	11.30p	5.83	2.91	Richard Montfort
12-24-31	9.30p	11.30p	5.83	2.91	Richard Montfort
12-30-31	9.30p	11.45p	7.50	3.75	Henry T. Rowbottom
12-31-31	9.30p	11.30p	6.94	3.47	Alpheus M. Illman
	TOTAL			$26.92	
Bill No. 28-0225 3-16-32	PRINCESS MARGUERITE at Seattle, Wash.				
12- 8-31	8.30p	10.30p	$ 7.50	$ 3.75	Roy M. Porter
	TOTAL			$ 3.75	[10]
Bill No. 28-1 1-18-32	PRINCESS MARGUERITE at Seattle, Wash.,				
1-10-32	8.30p	10.30p	$ 9.72	$4.86	Jos. E. Spengler
1-10-32	8.30p	10.30p	8.33	4.17	Alfred P. Smith
1-11-32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
1-11-32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
1-12-32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
1-12-32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
1-13-32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
1-13-32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
1-14-32	8.30p	10.30p	9.72	4.86	Bela E. Gowen

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
			PRINCESS MARGUERITE (Cont.)			
1–14–32	8.30p	10.30p	7.50		3.75	Roy C. Matterson
1–15–32	8.30p	10.30p	9.72		4.86	Bela E. Gowen
1–15–32	8.30p	10.30p	7.50		3.75	Roy C. Matterson
1–16–32	8.30p	10.30p	9.72		4.86	Bela E. Gowen
1–16–32	8.30p	10.30p	7.50		3.75	Roy C. Matterson
1–17–32	8.30p	10.30p	9.72	PR	4.86	Bela E. Gowen
1–17–32	8.30p	10.30p	7.50	PR	3.75	Roy C. Matterson
			TOTAL		$69.30	

Bill No. PRINCESS KATHLEEN
28–2 at Seattle, Wash.
1–21–32

1– 1–32	7.15a	9.15a	$ 8.89	PR	$ 8.89	Thomas W. Lynch
1– 1–32	7.15a	9.15a	6.94		13.88	Leonard I. Cornell
1– 3–32	7.15a	9.15a	7.50		15.00	Howard E. Norwood
1– 3–32	7.15a	9.15a	7.50		15.00	Louis M. Persons
1–10–32	7.15a	9.15a	8.33	PR	8.33	Alfred P. Smith
1–10–32	7.15a	9.15a	9.72		19.44	Joseph E. Spengler
1–17–32	7.15a	9.15a	9.72	PR	7.29	Bela E. Gowen
1–17–32	7.15a	9.15a	7.50	PR	3.75	Roy C. Matterson
			TOTAL		$91.58	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-16		PRINCESS MARGUERITE at Seattle, Wash.			
1-18-32	8.30p	10.30p	$ 8.33	$ 4.17	John P. Boyd Sr.
1-18-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
1-19-32	8.30p	10.30p	8.33	4.17	John P. Boyd Sr.
1-19-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
1-20-32	8.30p	10.30p	8.33	4.17	John P. Boyd Sr.
1-20-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
1-21-32	8.30p	10.30p	8.33	4.17	John P. Boyd Sr.
1-21-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
1-22-32	8.30p	10.30p	8.33	4.17	John P. Boyd Sr.
1-22-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
1-23-32	8.30p	10.30p	8.33	4.17	John P. Boyd Sr.
1-23-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
1-24-32	8.30p	10.30p	8.33	4.17	John P. Boyd Sr.
1-24-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
		TOTAL		$55.44	[11]
Bill No. 28-17 1-27-32		PRINCESS KATHLEEN at Seattle, Wash.			
1-24-32	7.15a	9.15a	$ 8.33	PR$ 8.33	John P. Boyd Sr.
1-24-32	7.15a	9.15a	7.50	PR 7.50	Walter P. Harris
		TOTAL		$15.83	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS MARGUERITE			
28–23		at Seattle, Wash.			
2– 5–32					
1–25–32	8.30p	10.30p	$ 7.50	$ 3.75	A. D. H. Jackson
1–25–32	8.30p	10.30p	6.94	3.47	Emerson E. David
1–26–32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
1–26–32	8.30p	10.30p	6.94	3.47	Emerson E. David
1–27–32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
1–27–32	8.30p	10.30p	6.94	3.47	Emerson E. David
1–28–32	9.00p	10.30p	7.50	3.75	A. D. H. Jackson
1–28–32	9.00p	10.30p	6.94	3.47	Emerson E. David
1–29–32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
1–29–32	8.30p	10.30p	6.94	3.47	Emerson E. David
1–30–32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
1–30–32	8.30p	10.30p	6.94	3.47	Emerson E. David
		TOTAL		$43.32	
Bill No.		PRINCESS KATHLEEN			
28–24		at Seattle, Wash.			
2–5–32					
1–31–32	7.15a	9.15a	$ 7.50	PR$ 7.50	A. D. H. Jackson
1–31–32	7.15a	9.15a	6.94	13.88	Emerson E. David
		TOTAL		$21.38	
Bill No.		PRINCESS CHARLOTTE			
28–25		at Seattle, Wash.			
2–5–32					
1–31–32	8.30p	10.30p	$ 7.50	$ 3.75	A. D. H. Jackson
1–31–32	8.30p	10.30p	6.94	3.47	Emerson E. David
		TOTAL		$ 7.22	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28–28 2–5–32		PRINCESS MARGUERITE at Victoria, B.C.			
1– 1–32	3.00p	5.00p	$ 6.94	PR$ 6.94	Earl F. Brakke
		TOTAL		$ 6.94	
Bill No. 28–53 2–17–32		PRINCESS KATHLEEN at Vancouver, B.C.			
1– 6–32	10.30p	11.45p	$ 6.94	$ 3.47	John C. Bailey
1– 7–32	10.30p	11.45p	6.94	3.47	John C. Bailey
1–13–32	10.30p	11.45p	7.50	3.75	John A. Wallman
1–14–32	10.30p	11.45p	7.50	3.75	John A. Wallman
1–20–32	10.30p	11.45p	6.94	3.47	Walter E. Ainsley
1–21–32	10.30p	11.45p	6.94	3.47	Walter E. Ainsley
1–27–32	10.30p	11.45p	5.83	2.91	Richard Montfort
1–28–32	10.30p	11.45p	5.83	2.91	Richard Montfort
		TOTAL		$27.20	[12]
Bill No. 28–46 2–15–32		PRINCESS CHARLOTTE at Seattle, Wash.			
2– 1–32	8.30p	10.30p	$ 7.50	$ 3.75	Roy M. Porter
2– 1–32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
2– 2–32	8.30p	10.30p	7.50	3.75	Roy M. Porter
2– 2–32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
2– 3–32	8.30p	10.30p	7.50	3.75	Roy M. Porter
2– 3–32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
2– 4–32	8.30p	10.30p	7.50	3.75	Roy M. Porter
2– 4–32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
2– 5–32	8.30p	10.30p	7.50	3.75	Roy M. Porter
2– 5–32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
2- 6-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
2- 6-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
2- 7-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
2- 7-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
		TOTAL		$52.50	

Bill No. PRINCESS KATHLEEN
28-47 at Seattle, Wash.
2-15-32

2- 7-32	7.15a	9.15a	$ 7.50	$15.00	Herman F. Schwandt
2- 7-32	7.15a	9.15a	7.50	15.00	Roy M. Porter
		TOTAL		$30.00	

Bill No. PRINCESS KATHLEEN
28-50 at Vancouver, B.C.
2-15-32

2- 3-32	9.30p	11.45p	$ 6.94	$ 3.47	Alpheus M. Illman
2- 4-32	9.30p	11.45p	6.94	3.47	Alpheus M. Illman
		TOTAL		$ 6.94	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS CHARLOTTE			
28-64		at Seattle, Washington			
2-20-32					
2- 8-32	8.30p	10.30p	$ 7.50	$ 3.75	Howard E. Norwood
2- 8-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
2- 9-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
2- 9-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
2-10-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
2-10-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
2-11-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
2-11-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
2-12-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
2-12-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
2-13-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
2-13-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
2-14-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
2-14-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
		TOTAL		$46.62	
Bill No.		PRINCESS KATHLEEN			
28-66		at Seattle, Wash.			
2-23-32					
2-14-32	7.15a	9.15a	$ 7.50	$15.00	Howard E. Norwood
2-14-32	7.15a	9.15a	5.83	11.66	Ray S. Steele
		TOTAL		$26.66	[13]
Bill No.		PRINCESS CHARLOTTE			
28-69		at Seattle, Wash.			
2-23-32					
2-15-32	8.30p	10.30p	$ 7.50	$ 3.75	Charles W. Durkee Jr.
2-15-32	8.30p	10.30p	6.94	3.47	Leonard I. Cornell
2-16-32	8.30p	10.30p	7.50	3.75	Charles W. Durkee Jr.

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
2–16–32	8.30p	10.30p	6.94	3.47	Leonard I. Cornell
2–17–32	8.30p	10.30p	7.50	3.75	Charles W. Durkee Jr.
2–17–32	8.30p	10.30p	6.94	3.47	Leonard I. Cornell
2–18–32	8.30p	10.30p	7.50	3.75	Charles W. Durkee Jr.
2–18–32	8.30p	10.30p	6.94	3.47	Leonard I. Cornell
2–19–32	8.30p	10.30p	7.50	3.75	Charles W. Durkee Jr.
2–19–32	8.30p	10.30p	9.72	4.86	Joseph E. Spengler
2–20–32	8.30p	10.30p	7.50	3.75	Charles W. Durkee Jr.
2–20–32	8.30p	10.30p	9.72	4.86	Joseph E. Spengler
2–21–32	8.30p	10.30p	7.50	3.75	Charles W. Durkee Jr.
2–21–32	8.30p	10.30p	9.72	4.86	Joseph E. Spengler
		TOTAL		$54.71	

Bill No. 28–70
2–23–32

PRINCESS KATHLEEN
at Seattle, Wash.

2–21–32	7.15a	9.15a	$ 9.72	PR$ 9.72	Joseph E. Spengler
2–21–32	7.15a	9.15a	7.50	PR 5.00	Charles W. Durkee Jr.
		TOTAL		$14.72	

Bill No. 28–88
2–29–32

PRINCESS CHARLOTTE
at Seattle, Wash.

2–22–32	8.30p	10.30p	$ 6.94	$ 3.47	Purley G. Hall
2–22–32	8.30p	10.30p	7.50	3.75	John P. Boyd Jr.
2–23–32	8.30p	10.30p	6.94	3.47	Purley G. Hall
2–23–32	8.30p	10.30p	7.50	3.75	John P. Boyd Jr.
2–24–32	8.30p	10.30p	6.94	3.47	Purley G. Hall
2–24–32	8.30p	10.30p	7.50	3.75	John P. Boyd Jr.
2–25–32	8.30p	10.30p	6.94	3.47	Purley G. Hall
2–25–32	8.30p	10.30p	7.50	3.75	John P. Boyd Jr.

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
2-26-32	8.30p	10.30p	6.94	3.47	Purley G. Hall
2-26-32	8.30p	10.30p	7.50	3.75	John P. Boyd Jr.
2-27-32	8.30p	10.30p	6.94	3.47	Purley G. Hall
2-27-32	8.30p	10.30p	7.50	3.75	John P. Boyd Jr.
2-28-32	8.30p	10.30p	6.94	3.47	Purley G. Hall
2-28-32	8.30p	10.30p	7.50	3.75	John P. Boyd Jr.
		TOTAL		$50.54	

Bill No. 28-89 3-1-32 — PRINCESS KATHLEEN at Seattle, Washington

2-22-32	7.15a	9.15a	$ 6.94	PR$ 6.94	Purley G. Hall
2-22-32	7.15a	9.15a	7.50	PR 7.50	John P. Boyd Jr.
2-28-32	7.15a	9.15a	6.94	13.88	Purley G. Hall
2-28-32	7.15a	9.15a	7.50	15.00	John P. Boyd Jr.
		TOTAL		$43.32	[14]

Bill No. 28-92 3-9-32 — PRINCESS CHARLOTTE at Seattle, Wash.

2-29-32	8.30p	10.30p	$ 6.94	$ 3.47	Ira L. Hazleton
2-29-32	8.30p	10.30p	8.33	4.16	Joseph E. Gee
		TOTAL		$ 7.63	

Bill No. 28-65 2-23-32 — PRINCESS KATHLEEN at Vancouver, B.C.

2-10-32	9.30p	11.45p	$ 7.50	$ 3.75	Henry T. Rowbottom
2-11-32	9.30p	11.30p	7.50	3.75	Henry T. Rowbottom
2-17-32	9.30p	11.45p	6.94	3.47	John C. Bailey
2-18-32	9.30p	11.30p	6.94	3.47	John C. Bailey
		TOTAL		$14.44	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28–123 3–21–32		PRINCESS KATHLEEN at Vancouver, B.C.			
2– 9–32	9.30p	11.45p	$ 5.83	$2.91	Richard Montfort
2–24–32	9.30p	11.45p	7.50	3.75	John A. Wallman
2–25–32	9.30p	11.30p	7.50	3.75	John A. Wallman
		TOTAL		$10.41	
Bill No. 28–121 3–21–32		PRINCESS KATHLEEN at Vancouver, B.C.			
3– 2–32	9.30p	11.45p	$ 6.94	$ 3.47	Walter E. Ainsley
		TOTAL		$ 3.47	
Bill No. 28–93 3–9–32		PRINCESS CHARLOTTE at Seattle, Wash.			
3– 1–32	8.30p	10.30p	$ 6.94	$ 3.47	Ira L. Hazleton
3– 1–32	8.30p	10.30p	8.33	4.16	Joseph H. Gee
3– 2–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
3– 2–32	8.30p	10.30p	8.33	4.16	Joseph H. Gee
3– 3–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
3– 3–32	8.30p	10.30p	8.33	4.16	Joseph H. Gee
3– 4–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
3– 4–32	8.30p	10.30p	6.94	3.47	Leonard I. Cornell
3– 5–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
3– 5–32	8.30p	10.30p	6.94	3.47	Leonard I. Cornell
3– 6–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
3– 6–32	8.30p	10.30p	6.94	3.47	Leonard I. Cornell
		TOTAL		$43.71	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS KATHLEEN			
28-94		at Seattle, Wash.			
3-9-32					
3- 6-32	7.15a	9.15a	$ 6.94	PR$ 6.94	Leonard I. Cornell
3- 6-32	7.15a	9.15a	6.94	PR 4.63	Ira L. Hazleton
		TOTAL		$11.57	[15]
Bill No.		PRINCESS CHARLOTTE			
28-118		at Seattle, Wash.			
3-21-32					
3- 7-32	8.30p	10.30p	$ 6.94	$ 3.47	Sigvald G. Nelson
3- 7-32	8.30p	10.30p	7.50	3.75	Louis M. Persons
3- 8-32	8.30p	10.30p	6.94	3.47	Sigvald G. Nelson
3- 8-32	8.30p	10.30p	7.50	3.75	Louis M. Persons
3- 9-32	8.30p	10.30p	6.94	3.47	Sigvald G. Nelson
3- 9-32	8.30p	10.30p	7.50	3.75	Louis M. Persons
3-10-32	8.30p	10.30p	6.94	3.47	Sigvald G. Nelson
3-10-32	8.30p	10.30p	7.50	3.75	Louis M. Persons
3-11-32	8.30p	10.30p	6.94	3.47	Sigvald G. Nelson
3-11-32	8.30p	10.30p	7.50	3.75	Louis M. Persons
3-12-32	8.30p	10.30p	6.94	3.47	Sigvald G. Nelson
3-12-32	8.30p	10.30p	7.50	3.75	Louis M. Persons
3-13-32	8.30p	10.30p	6.94	3.47	Sigvald G. Nelson
3-13-32	8.30p	10.30p	7.50	3.75	Louis M. Persons
		TOTAL		$50.54	
Bill No.		PRINCESS KATHLEEN			
28-117		at Seattle, Wash.			
3-21-32					
3-13-32	7.15a	9.15a	$ 6.94	PR$ 6.94	Sigvald G. Nelson
3-13-32	7.15a	9.15a	7.50	15.00	Louis M. Persons
		TOTAL		$21.94	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-136 3-22-32		PRINCESS CHARLOTTE at Seattle, Wash.			
3-14-32	8.30p	10.30p	$ 8.33	$ 4.16	Alfred P. Smith
3-14-32	8.30p	10.30p	8.33	4.16	James P. Sanderson
3-15-32	8.30p	10.30p	8.33	4.16	Alfred P. Smith
3-15-32	8.30p	10.30p	8.33	4.16	James P. Sanderson
3-16-32	8.30p	10.30p	8.33	4.16	Alfred P. Smith
3-16-32	8.30p	10.30p	8.33	4.16	James P. Sanderson
3-17-32	8.30p	10.30p	8.33	4.16	Alfred P. Smith
3-17-32	8.30p	10.30p	8.33	4.16	James P. Sanderson
3-18-32	8.30p	10.30p	8.33	4.16	Alfred P. Smith
3-18-32	8.30p	10.30p	8.33	4.16	James P. Sanderson
3-19-32	8.30p	10.30p	8.33	4.16	Alfred P. Smith
3-19-32	8.30p	10.30p	8.33	4.16	James P. Sanderson
3-20-32	8.30p	10.30p	8.33	4.16	Alfred P. Smith
3-20-32	8.30p	10.30p	8.33	4.16	James P. Sanderson
		TOTAL		$58.24	
Bill No. 28-135 3-22-32		PRINCESS MARGUERITE at Seattle, Wash.			
3-20-32	7.15a	9.15a	$ 8.33	PR$ 5.55	James P. Sanderson
3-20-32	7.15a	9.15a	8.33	PR 8.33	Alfred P. Smith
		TOTAL		$13.88	

[16]

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-149 3-29-32		PRINCESS CHARLOTTE at Seattle, Wash.			
3-21-32	8.30p	10.30p	$ 7.50	$ 3.75	Walter P. Harris
3-21-32	8.30p	10.30p	8.33	4.16	Joseph H. Gee
3-22-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
3-22-32	8.30p	10.30p	8.33	4.16	Joseph H. Gee
3-23-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
3-23-32	8.30p	10.30p	8.33	4.16	Joseph H. Gee
3-24-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
3-24-32	8.30p	10.30p	8.33	4.16	Joseph H. Gee
3-25-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
3-25-32	8.30p	10.30p	9.72	4.86	Joseph E. Spengler
3-26-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
3-26-32	8.30p	10.30p	9.72	4.86	Joseph E. Spengler
3-27-32	8.30p	10.30p	7.50	3.75	Walter P. Harris
3-27-32	8.30p	10.30p	9.72	4.86	Joseph E. Spengler
		TOTAL		$57.47	
Bill No. 28-148 3-29-32		PRINCESS MARGUERITE at Seattle, Wash.			
3-27-32	7.15a	9.15a	$ 9.72	PR$ 9.72	Joseph E. Spengler
3-27-32	7.15a	9.15a	7.50	15.00	Walter P. Harris
		TOTAL		$24.72	
Bill No. 28-150 4-4-32		PRINCESS MARGUERITE at Vancouver, B.C.			
3-16-32	9.30p	11.30p	$ 6.94	$ 3.47	Alpheus M. Illman
3-23-32	9.30p	11.45p	5.83	2.91	Richard Montfort
3-30-32	9.30p	11.45p	7.50	3.75	Henry T. Rowbottom
		TOTAL		$10.13	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-165 4-7-32		PRINCESS CHARLOTTE at Seattle, Wash.			
3-28-32	8.30p	10.30p	$ 7.50	$ 3.75	A. D. H. Jackson
3-28-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
3-29-32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
3-29-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
3-30-32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
3-30-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
3-31-32	8.50p	10.30p	7.50	3.75	A. D. H. Jackson
3-31-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
		TOTAL		$31.64	[17]
Bill No. 28-166 4-7-32		PRINCESS CHARLOTTE at Seattle, Wash.			
4- 1-32	8.30p	10.30p	$ 7.50	$ 3.75	A. D. H. Jackson
4- 1-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
4- 2-32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
4- 2-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
4- 3-32	8.30p	10.30p	7.50	3.75	A. D. H. Jackson
4- 3-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
		TOTAL		$23.73	
Bill No. 28-159 4-7-32		PRINCESS MARGUERITE at Seattle, Wash.			
4- 3-32	7.30a	9.15a	$ 8.33	$16.66	John P. Boyd, Sr.
4- 3-32	7.30a	9.15a	7.50	15.00	A. D. H. Jackson
		TOTAL		$31.66	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28–177 4–12–32		PRINCESS MARGUERITE at Vancouver, B.C.			
4– 6–32	9.30p	11.45p	$ 7.50	$ 3.75	John A. Wallman
		TOTAL		$ 3.75	
Bill No. 28–168 4–12–32		PRINCESS CHARLOTTE at Seattle, Wash.			
4– 4–32	8.30p	10.30p	$ 9.72	$ 4.86	Bela E. Gowen
4– 4–32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
4– 5–32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
4– 5–32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
4– 6–32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
4– 6–32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
4– 7–32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
4– 7–32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
4– 8–32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
4– 8–32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
4– 9–32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
4– 9–32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
4–10–32	8.30p	10.30p	9.72	4.86	Bela E. Gowen
4–10–32	8.30p	10.30p	7.50	3.75	Roy C. Matterson
		TOTAL		$60.27	
Bill No. 28–169 4–12–32		PRINCESS MARGUERITE at Seattle, Wash.			
4–10–32	7.15a	9.15a	$ 7.50	$15.00	Roy C. Matterson
4–10–32	7.15a	9.15a	9.72	19.44	Bela E. Gowen
		TOTAL		$34.44	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-180 4-21-32		PRINCESS CHARLOTTE at Seattle, Wash.			
4-11-32	8.30p	10.30p	$ 7.50	$ 3.75	Howard E. Norwood
4-11-32	8.30p	10.30p	6.94	3.47	Emerson E. David
4-12-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
4-12-32	8.30p	10.30p	6.94	3.47	Emerson E. David
4-13-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
4-13-32	8.30p	10.30p	6.94	3.47	Emerson E. David
4-14-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
4-14-32	8.30p	10.30p	6.94	3.47	Emerson E. David
4-15-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
4-15-32	8.30p	10.30p	6.94	3.47	Emerson E. David
4-16-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
4-16-32	8.30p	10.30p	6.94	3.47	Emerson E. David
4-17-32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
4-17-32	8.30p	10.30p	6.94	3.47	Emerson E. David
		TOTAL		$50.54	
Bill No. 28-179 4-21-32		PRINCESS MARGUERITE at Seattle, Wash.			
4-17-32	7.15a	9.15a	$ 7.50	PR$ 7.50	Howard E. Norwood
4-17-32	7.15a	9.05a	6.94	PR 6.94	Emerson E. David
		TOTAL		$14.44	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-197 5-4-32		PRINCESS CHARLOTTE at Seattle, Wash.			
4-18-32	8.30p	10.30p	$ 7.50	$ 3.75	Roy M. Porter
4-18-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
4-19-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
4-19-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
4-20-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
4-20-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
4-21-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
4-21-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
4-22-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
4-22-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
4-23-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
4-23-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
4-24-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
4-24-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
		TOTAL		$52.50	
Bill No. 28-196 5-4-32		PRINCESS MARGUERITE at Seattle, Wash.			
4-24-32	7.15a (prorated)	5.00p	$ 7.50	PR$ 7.50	Herman F. Schwandt
4-24-32	7.15a	9.15a	7.50	15.00	Roy M. Porter
		TOTAL		$22.50	
Bill No. 28-198 5-4-32		PRINCESS CHARLOTTE at Seattle, Wash.			
4-25-32	8.30p	10.30p	$ 7.50	$ 3.75	Charles W. Durkee, Jr.
4-25-32	8.30p	10.30p	5.83	2.91	Ray S. Steele
		TOTAL		$ 6.66	

[19]

	Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No.			PRINCESS NORAH				
28–201			at Seattle, Wash.				
5–4–32			*Stricken by stipulation—Paid*				
	4–26–32	5.00p	12.30a	$ 5.83	PR$	3.89	Ray S. Steele
		(prorated)					
	4–26–32	10.30p	12.30a	7.50		3.75	Charles W. Durkee, Jr.
			TOTAL			$ 7.64	
Bill No.			PRINCESS MARGUERITE				
28–195			at Seattle, Wash.				
5–4–32							
	4–26–32	8.30p	12.30a	$ 7.50	PR$	3.75	Charles W. Durkee, Jr.
		(prorated)					
	4–26–32	5.00p	12.30a	5.83	PR	3.89	Ray S. Steele
		(prorated)					
	4–27–32	8.30p	10.30p	7.50		3.75	Charles W. Durkee, Jr.
	4–27–32	8.30p	10.30p	5.83		2.91	Ray S. Steele
	4–28–32	8.30p	10.30p	7.50		3.75	Charles W. Durkee, Jr.
	4–28–32	8.30p	10.30p	5.83		2.91	Ray S. Steele
	4–29–32	8.30p	10.30p	7.50		3.75	Charles W. Durkee, Jr.
	4–29–32	8.30p	10.30p	5.83		2.91	Ray S. Steele
	4–30–32	8.30p	10.30p	7.50		3.75	Charles W. Durkee, Jr.
	4–30–32	8.30p	10.30p	5.83		2.91	Ray S. Steele
			TOTAL			$34.28	
Bill No.			PRINCESS KATHLEEN				
28–199			at Seattle, Wash.				
5–4–32							
	5– 1–32	7.15a	5.00p	$ 7.50	PR$	5.00	Charles W. Durkee, Jr.
		(prorated)					
	5– 1–32	7.15a	9.15a	5.83		11.66	Ray S. Steele
			TOTAL			$16.66	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-200 5-4-32		PRINCESS MARGUERITE at Seattle, Wash.			
5- 1-32	9.00p	11.30p	$ 5.83	$ 2.91	Ray S. Steele
5- 1-32	9.00p	11.30p	7.50	3.75	Charles W. Durkee, Jr.
		TOTAL		$ 6.66	[20]
Bill No. 28-218 5-10-32		PRINCESS MARGUERITE at Seattle, Wash.			
5- 2-32	9.00p	11.00p	$ 7.50	$ 3.75	Louis M. Persons
5- 2-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
5- 3-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
5- 3-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
5- 4-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
5- 4-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
5- 5-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
5- 5-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
5- 6-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
5- 6-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
5- 7-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
5- 7-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
5- 8-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
5- 8-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
		TOTAL		$52.50	
Bill No. 28-219 5-10-32		PRINCESS KATHLEEN at Seattle, Washington			
5- 8-32	7.15a	9.15a	$ 7.50	$15.00	Louis M. Persons
5- 8-32	7.15a	9.15a	7.50	15.00	John P. Boyd, Jr.
		TOTAL		$30.00	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28-232 5-18-32		PRINCESS MARGUERITE at Seattle, Wash.				
5- 9-32	9.00p	11.00p	$ 9.72		$ 4.86	Joseph E. Spengler
5- 9-32	9.00p	11.00p	6.94		3.47	Ira L. Hazleton
5-10-32	9.00p	11.00p	9.72		4.86	Joseph E. Spengler
5-10-32	9.00p	11.00p	6.94		3.47	Ira L. Hazleton
5-11-32	9.00p	11.00p	9.72		4.86	Joseph E. Spengler
5-11-32	9.00p	11.00p	6.94		3.47	Ira L. Hazleton
5-12-32	9.00p	11.00p	9.72		4.86	Joseph E. Spengler
5-12-32	9.00p	11.00p				
	(prorated)		6.94	PR	2.31	Ira L. Hazleton
5-13-32	9.00p	11.00p	9.72		4.86	Joseph E. Spengler
5-13-32	9.00p	11.00p	6.94		3.47	Ira L. Hazleton
5-14-32	9.00p	11.00p	9.72		4.86	Joseph E. Spengler
5-14-32	9.00p	11.00p	6.94		3.47	Ira L. Hazleton
5-15-32	9.00p	11.00p	9.72		4.86	Joseph E. Spengler
5-15-32	9.00p	11.00p	6.94		3.47	Ira L. Hazleton
		TOTAL			$57.15	
Bill No. 28-233 5-18-32		PRINCESS KATHLEEN at Seattle, Wash.				
5-15-32	7.15a	5.00p	$ 9.72	PR	$12.96	Joseph E. Spengler
	(prorated)					
5-15-32	7.15a	9.15a	6.94		13.88	Ira L. Hazleton
		TOTAL			$26.84	

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Service Date of	From	To	Time Charged	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-252 5-24-32			PRINCESS MARGUERITE at Seattle, Wash.			
5-16-32	9.00p	11.00p		$ 8.33	$ 4.16	Joseph H. Gee
5-16-32	9.00p	11.00p		6.94	3.47	Leonard I. Cornell
5-17-32	9.00p	11.00p		8.33	4.16	Joseph H. Gee
5-17-32	9.00p	11.00p		6.94	3.47	Leonard I. Cornell
5-18-32	9.00p	11.00p		8.33	4.16	Joseph H. Gee
5-18-32	9.00p	11.00p		6.94	3.47	Leonard I. Cornell
5-19-32	9.00p	11.00p		8.33	4.16	Joseph H. Gee
5-19-32	9.00p	11.00p		6.94	3.47	Leonard I. Cornell
5-20-32	9.00p	11.00p		8.33	4.16	Joseph H. Gee
5-20-32	9.00p	11.00p		6.94	3.47	Leonard I. Cornell
5-21-32	9.00p	11.00p		8.33	4.16	Joseph H. Gee
5-21-32	9.00p	11.00p		6.94	3.47	Leonard I. Cornell
5-22-32	9.00p	11.00p		8.33	4.16	Joseph H. Gee
5-22-32	9.00p	11.00p		6.94	3.47	Leonard I. Cornell
			TOTAL		$53.41	
Bill No. 28-253 5-24-32			PRINCESS KATHLEEN at Seattle, Wash.			
5-22-32	7.15a	9.15a		$ 8.33	PR$11.11	Joseph H. Gee
5-22-32	7.15a	9.15a		6.94	13.88	Leonard I. Cornell
			TOTAL		$24.99	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-254 5-24-32		PRINCESS KATHLEEN at Vancouver, B.C.			
5- 1-32	6.30p	7.30p	$ 6.94	$ 3.47	Alpheus M. Illman
5- 7-32	6.30p	7.30p	7.50	3.75	Henry T. Rowbottom
5- 8-32	6.30p	7.30p	6.94	3.47	Walter E. Ainsley
5-14-32	6.30p	7.30p	6.94	3.47	John C. Bailey
5-15-32	6.30p	7.30p	6.94	3.47	John C. Bailey
5-21-32	6.30p	7.30p	6.94	3.47	Walter E. Ainsley
5-22-32	6.30p	7.30p	6.94	3.47	Walter E. Ainsley
		TOTAL		$24.57	
Bill No. 28-277 6-2-32		PRINCESS MARGUERITE at Seattle, Wash.			
5-23-32	9.00p	11.00p	$ 8.33	$ 4.16	James P. Sanderson
5-23-32	9.00p	11.00p	6.94	3.47	Purley G. Hall
5-25-32	9.00p	11.00p	8.33	4.16	James P. Sanderson
5-25-32	9.00p	11.00p	6.94	3.47	Purley G. Hall
5-26-32	9.00p	11.00p	8.33	4.16	James P. Sanderson
5-26-32	9.00p	11.00p	6.94	3.47	Purley G. Hall
5-27-32	9.00p	11.00p	8.33	4.16	James P. Sanderson
5-27-32	9.00p	11.00p	6.94	3.47	Purley G. Hall
5-28-32	9.00p	11.00p	8.33	4.16	James P. Sanderson
5-28-32	9.00p	11.00p	6.94	3.47	Purley G. Hall
5-29-32	9.00p	11.00p	8.33	4.16	James P. Sanderson
5-29-32	9.00p	11.00p	6.94	3.47	Purley G. Hall
		TOTAL		$45.78	

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Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-276 6-2-32		PRINCESS KATHLEEN at Seattle, Wash.			
5-29-32	7.15a	9.15a	$ 6.94	$13.88	Purley G. Hall
5-29-32	7.15a	9.15a	8.33	16.66	James P. Sanderson
		TOTAL		$30.54	
Bill No. 28-261 6-2-32		PRINCESS MARGUERITE at Seattle, Wash.			
5-30-32	9.00p	11.00p	$ 9.72	$ 4.86	Joseph E. Spengler
5-30-32	9.00p	11.30p	6.94	3.47	Sigvald G. Nelson
5-30-32	9.00p	11.30p	8.33	4.16	Alfred P. Smith
5-31-32	9.00p	11.00p	6.94	3.47	Sigvald G. Nelson
5-31-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
		TOTAL		$20.12	
Bill No. 28-262 6-2-32		PRINCESS KATHLEEN at Seattle, Wash.			
5-30-32	7.15a	9.15a	$ 8.33	$16.66	Alfred P. Smith
5-30-32	7.15a	9.15a	6.94	PR 6.94	Sigvald G. Nelson
		TOTAL		$23.60	
Bill No. 28-265 6-2-32		PRINCESS LOUISE at Tacoma, Wash. *Stricken by stipulation—Paid*			
5-30-32	6.15a	8.00a	$ 6.94	$ 3.47	William G. McNamara
5-31-32	1.30a	2.45a	6.94	3.47	Leslie A. Sherby
5-31-32	1.30a	2.45a	8.33	4.16	Alfred Voligny
		TOTAL		$11.10	

	Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-278 6-3-32			PRINCESS ADELAIDE at Seattle, Wash.			
	5-24-32	10.00p	12.00p	$ 8.33	$ 4.16	James P. Sanderson
	5-24-32	10.00p	12.00p	6.94	3.47	Purley G. Hall
			TOTAL		$ 7.63	
Bill No. 28-290 6-3-32			PRINCESS KATHLEEN at Vancouver, B.C.			
	5-28-32	6.30p	7.30p	$ 5.83	$ 2.91	Richard Montfort
	5-29-32	6.30p	7.30p	5.83	2.91	Richard Montfort
	5-30-32	6.30p	7.30p	7.50	3.75	John A. Wallman
			TOTAL		$ 9.57	[23]
Bill No. 28-295 6-6-32			PRINCESS MARGUERITE at Seattle, Wash.			
	6- 1-32	9.00p	11.00p	$ 8.33	$ 4.16	Alfred P. Smith
	6- 1-32	9.00p	11.00p	6.94	3.47	Sigvald G. Nelson
	6- 2-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
	6- 2-32	9.00p	11.00p	6.94	3.47	Sigvald G. Nelson
	6- 3-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
	6- 3-32	9.00p	11.00p	6.94	3.47	Sigvald G. Nelson
	6- 4-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
	6- 4-32	9.00p	11.00p	6.94	3.47	Sigvald G. Nelson
	6- 5-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
	6- 5-32	9.00p	11.00p	6.94	3.47	Sigvald G. Nelson
			TOTAL		$38.15	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No.			PRINCESS KATHLEEN			
28–296			at Seattle, Wash.			
6–6–32						
6– 5–32	7.15a	9.15a	$ 6.94	PR	$10.41	Sigvald G. Nelson
6– 5–32	7.15a	9.15a	8.33	PR	8.33	Alfred P. Smith
		TOTAL			$18.74	
Bill No.			PRINCESS MARGUERITE			
28–305			at Seattle, Wash.			
6–16–32						
6– 6–32	9.00p	11.00p	$ 6.94		$ 3.47	Emerson E. David
6– 6–32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
6– 7–32	7.20p	11.00p	6.94	PR	2.31	Emerson E. David
6– 7–32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
6– 8–32	9.00p	11.00p	6.94		3.47	Emerson E. David
6– 8–32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
6– 9–32	9.00p	11.00p	6.94		3.47	Emerson E. David
6– 9–32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
6–10–32	9.00p	11.00p	6.94		3.47	Emerson E. David
6–10–32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
6–11–32	9.00p	11.00p	6.94		3.47	Emerson E. David
6–11–32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
6–12–32	9.00p	11.00p	6.94		3.47	Emerson E. David
6–12–32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
		TOTAL			$57.15	
Bill No.			PRINCESS KATHLEEN			
28–308			at Seattle, Wash.			
6–16–32						
6–12–32	7.15a	9.15a	$ 6.94	PR	6.94	Emerson E. David
6–12–32	7.15a	9.15a	9.72	PR	9.72	Bela E. Gowen
		TOTAL			$16.66	

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Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS MARGUERITE				
28-345		at Seattle, Wash.				
6-29-32						
6-13-32	9.00p	11.00p	$ 7.50		$ 3.75	Howard E. Norwood
6-13-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
6-14-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
6-14-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
6-15-32	9.00p	12.00MN	7.50	PR	3.75	Howard E. Norwood
6-15-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
6-16-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
6-16-32	9.00p	11.00p	7.50		3.75	Louis M. Persons
6-17-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
6-17-32	9.00p	11.00p	7.50		3.75	Louis M. Persons
6-18-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
6-18-32	9.00p	11.00p	7.50		3.75	Louis M. Persons
6-19-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
6-19-32	9.00p	11.00p	7.50		3.75	Louis M. Persons
		TOTAL			$51.66	
Bill No.		PRINCESS KATHLEEN				
28-344		at Seattle, Wash.				
6-29-32						
6-19-32	7.15a	8.30a	$ 7.50	PR	$ 7.50	Louis M. Persons
6-19-32	7.15a	9.15a	7.50	PR	7.50	Howard E. Norwood
		TOTAL			$15.00	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-309 6-16-32		PRINCESS KATHLEEN at Vancouver, B.C.			
6- 4-32	6.30p	7.30p	$ 7.50	$ 3.75	John A. Wallman
6- 5-32	6.30p	7.30p	7.50	3.75	John A. Wallman
6-11-32	6.30p	7.30p	6.94	3.47	Alpheus M. Illman
6-12-32	6.30p	7.30p	6.94	3.47	Alpheus M. Illman
		TOTAL		$14.44	
Bill No. 28-331 6-22-32		PRINCESS KATHLEEN at Vancouver, B.C.			
6-18-32	6.30p	7.30p	$ 7.50	$ 3.75	Henry T. Rowbottom
6-19-32	6.30p	7.30p	7.50	3.75	Henry T. Rowbottom
		TOTAL		$ 7.50	
Bill No. 28-360 6-8-32		PRINCESS MARGUERITE at Seattle, Wash.			
6-20-32	9.00p	11.00p	$ 7.50	$ 3.75	Herman F. Schwandt
6-20-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
6-21-32	9.00p	11.00p	7.50	3.75	Herman F. Schwandt
6-21-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
6-22-32	9.00p	11.00p	7.50	3.75	Herman F. Schwandt
6-22-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
6-23-32	9.00p	11.00p	7.50	3.75	Herman F. Schwandt
6-23-32	9.00p	11.00p	7.50	3.75	Walter P. Harris
6-24-32	9.00p	11.00p	7.50	3.75	Herman F. Schwandt
6-24-32	9.00p	11.00p	7.50	3.75	Walter P. Harris
6-25-32	9.00p	11.00p	7.50	3.75	Herman F. Schwandt

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
6-25-32	9.00p	11.00p	7.50	3.75	Walter P. Harris
6-26-32	9.00p	11.00p	7.50	3.75	Herman F. Schwandt
6-26-32	9.00p	11.00p	7.50	3.75	Walter P. Harris
		TOTAL		$52.50	[25]

Bill No. 28-362 7-8-32 — PRINCESS KATHLEEN at Seattle, Wash.

6-26-32	7.15a	9.15a	$ 7.50	$15.00	Walter P. Harris
6-26-32	7.15a	9.15a	7.50	15.00	Herman F. Schwandt
		TOTAL		$30.00	

Bill No. 28-361 7-8-32 — PRINCESS MARGUERITE Seattle, Wash.

6-27-32	9.00p	11.00p	$ 7.50	$ 3.75	Arba D. H. Jackson
6-27-32	9.00p	11.00p	7.50	3.75	Walter P. Harris
6-28-32	9.00p	11.00p	7.50	3.75	Arba D. H. Jackson
6-28-32	9.00p	11.00p	7.50	3.75	Walter P. Harris
6-29-32	9.00p	11.00p	7.50	3.75	Arba D. H. Jackson
6-29-32	9.00p	11.00p	7.50	3.75	Walter P. Harris
6-30-32	9.00p	11.00p	7.50	3.75	Arba D. H. Jackson
6-30-32	9.00p	11.00p	9.72	4.86	Bela E. Gowen
		TOTAL		$31.11	

Bill No. 28-468 7-28-32 — PRINCESS KATHLEEN at Vancouver, B.C.

6-25-32	6.30p	7.30p	$ 5.83	$ 2.91	Richard Montfort
6-26-32	6.30p	7.30p	5.83	2.91	Richard Montfort
		TOTAL		$ 5.82	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28-469A 7-29-32			PRINCESS JOAN at Vancouver, B.C. *Stricken by stipulation—Paid*			
6-22-32	10.40p	11.40p	$ 5.83		$ 2.91	Richard Montfort
			TOTAL		$ 2.91	
Bill No. 28-363 7-8-32			PRINCESS MARGUERITE at Seattle, Wash.			
7- 1-32	9.00p	11.00p	$ 7.50		$ 3.75	Arba D. H. Jackson
7- 1-32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
7- 2-32	9.00p	12.00p	7.50	PR	3.75	Arba D. H. Jackson
7- 2-32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
7- 3-32	6.30p	11.30p	7.50	PR	3.75	Arba D. H. Jackson
7- 3-32	9.00p	11.00p	9.72		4.86	Bela E. Gowen
			TOTAL		$25.83	
Bill No. 28-359 7-8-32			PRINCESS KATHLEEN at Seattle, Wash.			
7- 3-32	7.15a (prorated)	5.00p	$ 7.50	PR	$ 5.00	Arba D. H. Jackson
7- 3-32	7.15a	5.00p	9.72	PR	14.58	Bela E. Gowen
			TOTAL		$19.58	[26]
Bill No. 28-364 7-8-32			PRINCESS KATHLEEN at Vancouver, B.C.			
7- 2-32	6.30p	7.30p	$ 7.50		$ 3.75	John A. Wallman
7- 3-32	6.30p	7.30p	7.50		3.75	John A. Wallman
			TOTAL		$ 7.50	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28-409 7-14-32			PRINCESS MARGUERITE at Seattle, Washington			
7- 4-32	9.00p	11.00p	$ 6.94		$ 3.47	Ira L. Hazleton
7- 4-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee Jr.
7- 4-32	9.00p	11.00p	8.33	PR	2.08	Joseph H. Gee
7- 5-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee Jr.
7- 5-32	9.00p	11.00p	8.33	PR	2.08	Joseph H. Gee
7- 6-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee Jr.
7- 6-32	9.00p	11.00p	8.33		4.16	Joseph H. Gee
7- 7-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee Jr.
7- 7-32	9.00p	12.30a	8.33	PR	4.16	Joseph H. Gee
7- 8-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee Jr.
7- 8-32	9.00p	11.15p	8.33	PR	2.08	Joseph H. Gee
7- 9-32	9.00p	11.15p	7.50	PR	2.50	Charles W. Durkee Jr.
7- 9-32	9.00p	11.00p	8.33		4.16	Joseph H. Gee
7-10-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee Jr.
7-10-32	8.00p	11.30p	8.33	PR	4.16	Joseph H. Gee
		TOTAL			$51.35	
Bill No. 28-413 7-14-32			PRINCESS KATHLEEN at Vancouver, B.C.			
7- 4-32	6.30p	7.30p	$ 6.94		$ 3.47	Walter E. Ainsley
7- 9-32	6.30p	7.30p	6.94		3.47	Walter E. Ainsley
7-10-32	6.30p	7.30p	6.94		3.47	Walter E. Ainsley
		TOTAL			$10.41	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS KATHLEEN			
28-408		at Seattle, Wash.			
7-14-32					
7- 4-32	7.15a	9.15a	$ 7.50	$15.00	Charles W. Durkee Jr.
7- 4-32	7.15a	9.15a	8.33	PR 12.50	Joseph H. Gee
7-10-32	7.15a	9.15a	7.50	PR 7.50	Charles W. Durkee Jr.
7-10-32	7.15a	9.15a	8.33	16.66	Joseph H. Gee
		TOTAL		$51.66	
Bill No.		PRINCESS MARGUERITE			
28-464		at Seattle, Wash.			
7-26-32					
7-11-32	9.00p	11.00p	$ 8.33	$ 4.16	Alfred P. Smith
7-11-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
7-12-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
7-12-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
7-13-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
7-13-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
7-14-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
7-14-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
7-15-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
7-15-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
7-16-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
7-16-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
7-17-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
7-17-32	9.00p	11.00p	7.50	3.75	John P. Boyd Jr.
		TOTAL		$55.37	

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Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS KATHLEEN			
28-465		at Seattle, Wash.			
7-26-32					
7-17-32	7.15a	5.00p	$ 7.50	$15.00	John P. Boyd Jr.
7-17-32	7.15a	5.00p	8.33	PR 12.50	Alfred P. Smith
		TOTAL		$27.50	
Bill No.		PRINCESS KATHLEEN			
28-430		at Vancouver, B.C.			
7-25-32					
7-16-32	6.30p	7.30p	$ 6.94	$ 3.47	Alpheus M. Illman
7-17-32	6.30p	7.30p	6.94	3.47	Alpheus M. Illman
		TOTAL		$ 6.94	
Bill No.		PRINCESS MARGUERITE			
28-474		at Seattle, Wash.			
8-4-32					
7-18-32	9.00p	11.00p	$ 6.94	$ 3.47	Ira L. Hazleton
7-18-32	9.00p	11.00p	9.72	4.86	Bela E. Gowen
7-19-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
7-19-32	9.00p	11.00p	9.72	4.86	Bela E. Gowen
7-20-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
7-20-32	9.00p	11.00p	9.72	4.86	Bela E. Gowen
7-21-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
7-21-32	9.00p	11.00p	6.94	3.47	Leonard I. Cornell
7-22-32	10.00p	11.59p	6.94	3.47	Ira L. Hazleton
7-22-32	10.00p	11.59p	6.94	3.47	Leonard I. Cornell
7-23-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
7-23-32	9.00p	11.00p	6.94	3.47	Leonard I. Cornell
7-24-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
7-24-32	9.00p	11.00p	6.94	3.47	Leonard I. Cornell
		TOTAL		$52.75	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28-473 8-4-32			PRINCESS KATHLEEN at Seattle, Wash.			
7-24-32	7.15a	9.15a	$ 6.94	PR	$10.41	Leonard I. Cornell
7-24-32	7.15a	9.15a	6.94	PR	6.94	Ira L. Hazleton
		TOTAL			$17.35	[28]
Bill No. 28-481 8-10-32			PRINCESS MARGUERITE at Seattle, Wash.			
7-25-32	9.00p	11.00p	$ 7.50		$ 3.75	Arba D. H. Jackson
7-25-32	9.00p	11.00p	7.50		3.75	Walter P. Harris
7-26-32	9.00p	11.00p	7.50		3.75	Arba D. H. Jackson
7-26-32	9.00p	11.00p	7.50		3.75	Walter P. Harris
7-27-32	9.00p	12.00MN	7.50	PR	3.75	Arba D. H. Jackson
7-27-32	7.00p	11.00p	7.50	PR	3.75	Walter P. Harris
7-28-32	9.00p	11.00p	7.50		3.75	Arba D. H. Jackson
7-28-32	9.00p	11.00p	7.50		3.75	Walter P. Harris
7-29-32	9.00p	11.00p	7.50		3.75	Arba D. H. Jackson
7-29-32	9.00p	11.00p	7.50		3.75	Walter P. Harris
7-30-32	9.00p	11.00p	7.50		3.75	Arba D. H. Jackson
7-30-32	9.00p	11.00p	7.50		3.75	Walter P. Harris
7-31-32	9.00p	11.00p	7.50		3.75	Arba D. H. Jackson
7-31-32	9.00p	11.00p	7.50		3.75	Walter P. Harris
		TOTAL			$52.50	
Bill No. 28-480-A 8-10-32			PRINCESS KATHLEEN at Seattle, Wash.			
7-31-32	7.15a	5.00p	$ 7.50	PR	$ 7.50	Arba D. H. Jackson
7-31-32	7.15a	9.15a	7.50		15.00	Walter P. Harris
		TOTAL			$22.50	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28-483 8-10-32		PRINCESS KATHLEEN at Vancouver, B.C.				
7-23-32	6.30p	7.30p	$ 5.83		$ 2.91	Richard Montfort
7-24-32	6.30p	7.30p	5.83		2.91	Richard Montfort
7-30-32	6.30p	7.30p	7.50		3.75	John A. Wallman
7-31-32	6.30p	7.30p	7.50		3.75	John A. Wallman
		TOTAL			$13.32	
Bill No. 28-530 8-12-32		PRINCESS MARGUERITE at Seattle, Wash.				
8- 1-32	9.00p	11.00p	$ 7.50		$ 3.75	Herman F. Schwandt
8- 1-32	9.00p	11.00p	6.94		3.47	Purley G. Hall
8- 2-32	9.00p	11.00p	7.50		3.75	Herman F. Schwandt
8- 2-32	9.00p	11.00p	6.94		3.47	Purley G. Hall
8- 3-32	9.00p	11.00p	7.50		3.75	Herman F. Schwandt
8- 3-32	9.00p	11.00p	6.94		3.47	Purley G. Hall
8- 4-32	6.50p	11.00p	7.50	PR	3.75	Herman F. Schwandt
8- 4-32	9.00p	11.00p	6.94		3.47	Purley G. Hall
8- 5-32	9.00p	11.00p	7.50		3.75	Herman F. Schwandt
8- 5-32	9.00p	11.00p	6.94		3.47	Purley G. Hall
8- 6-32	9.00p	11.00p	7.50		3.75	Herman F. Schwandt
8- 6-32	9.00p	11.00p	6.94		3.47	Purley G. Hall
8- 7-32	9.00p	11.00p	7.50		3.75	Herman F. Schwandt
8- 7-32	8.00p	11.00p	6.94	PR	3.47	Purley G. Hall
		TOTAL			$50.54	

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Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-529 8-12-32		PRINCESS KATHLEEN at Seattle, Wash.			
8- 7-32	7.15a	9.15a	$ 7.50	$15.00	Herman F. Schwandt
8- 7-32	7.15a	9.15a	6.94	13.88	Purley G. Hall
		TOTAL		$28.88	
Bill No. 28-512 8-11-32		PRINCESS KATHLEEN at Vancouver, B.C.			
8- 6-32	6.30p	7.30p	$ 7.50	$ 3.75	Henry T. Rowbottom
8- 7-32	6.30p	7.30p	7.50	3.75	Henry T. Rowbottom
		TOTAL		$ 7.50	
Bill No. 28-534 8-22-32		PRINCESS MARGUERITE at Seattle, Wash.			
8- 8-32	7.15p	11.00p	$ 6.94	PR$ 3.47	Ira L. Hazleton
8- 8-32	9.00p	11.00p	7.50	3.75	John P. Boyd, Jr.
8- 9-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
8- 9-32	9.00p	11.00p	7.50	3.75	John P. Boyd, Jr.
8-10-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
8-10-32	9.00p	11.00p	7.50	3.75	John P. Boyd, Jr.
8-11-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
8-11-32	9.00p	11.00p	5.83	2.91	Ray S. Steele
8-12-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
8-12-32	9.00p	11.00p	7.50	3.75	John P. Boyd, Jr.
8-13-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
8-13-32	9.00p	11.00p	7.50	3.75	John P. Boyd, Jr.
8-14-32	9.00p	11.00p	6.94	3.47	Ira L. Hazleton
8-14-32	9.00p	11.00p	7.50	3.75	John P. Boyd, Jr.
		TOTAL		$49.70	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS KATHLEEN				
28-535		at Seattle, Wash.				
8-22-32						
8-14-32	7.15a	5.00p	$ 6.94	PR	$10.41	Ira L. Hazleton
8-14-32	7.15a	5.00p	7.50	PR	5.00	John P. Boyd, Jr.
		TOTAL			$15.41	
Bill No.		PRINCESS MARGUERITE				
28-583		at Seattle, Wash.				
8-24-32						
8-15-32	9.00p	11.00p	$ 6.94		$ 3.47	Leonard I. Cornell
8-15-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee, Jr.
8-16-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
8-16-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee, Jr.
8-17-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
8-17-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee, Jr.
8-18-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
8-18-32	9.00p	12.00p	7.50	PR	2.50	Charles W. Durkee, Jr.
8-19-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
8-19-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee, Jr.
8-20-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
8-20-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee, Jr.
8-21-32	9.00p	11.00p	6.94		3.47	Leonard I. Cornell
8-21-32	9.00p	11.00p	7.50		3.75	Charles W. Durkee, Jr.
		TOTAL			$49.29	[30]
Bill No.		PRINCESS KATHLEEN				
28-582		at Seattle, Wash.				
8-24-32						
8-21-32	7.15a	5.00p	$ 6.94	PR	$ 6.94	Leonard I. Cornell
8-21-32	7.15a	5.00p	7.50	PR	7.50	Charles W. Durkee, Jr.
		TOTAL			$14.44	

Date of Service	Time From	Charged To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS KATHLEEN			
28-551		at Vancouver, B.C.			
8-23-32					
8-13-32	6.30p	7.30p	$ 6.94	$ 3.47	Walter E. Ainsley
8-14-32	6.30p	7.30p	6.94	3.47	Walter E. Ainsley
		TOTAL		$ 6.94	
Bill No.		PRINCESS PATRICIA			
28-563		at Tacoma, Wash.			
8-23-32		*Stricken by stipulation—Paid*			
8-11-32	7.00a	8.00a	$ 6.94	$ 3.47	Leslie A. Sherby
8-11-32	10.00p	11.00p	6.94	3.47	Leslie A. Sherby
8-11-32	10.00p	11.00p	6.94	3.47.	William G. McNamara
		TOTAL		$10.41	
Bill No.		PRINCESS KATHLEEN			
28-571		at Vancouver, B.C.			
8-24-32					
8-20-32	6.30p	7.30p	$ 5.83	$ 2.91	Richard Montfort
8-21-32	6.30p	7.30p	5.83	2.91	Richard Montfort
		TOTAL		$ 5.82	
Bill No.		PRINCESS MARGUERITE			
28-607		at Seattle, Wash.			
9-12-32					
8-22-32	6.40p	11.00p	$ 8.33	PR$ 4.16	Joseph H. Gee
8-22-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
8-23-32	9.00p	11.00p	8.33	4.16	Joseph H. Gee
8-23-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
8-24-32	9.00p	11.00p	8.33	4.16	Joseph H. Gee

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
8-24-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
8-25-32	9.00p	11.00p	8.33	4.16	Joseph H. Gee
8-25-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
8-26-32	9.00p	11.00p	8.33	4.16	Joseph H. Gee
8-26-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
8-27-32	9.00p	11.00p	8.33	4.16	Joseph H. Gee
8-27-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
8-28-32	9.00p	11.00p	8.33	4.16	Joseph H. Gee
8-28-32	9.00p	11.00p	7.50	3.75	Louis M. Persons
		TOTAL		$55.37	

Bill No. PRINCESS KATHLEEN
28-606 at Seattle, Wash.
9-12-32

8-28-32	7.15a	5.00p	$ 8.33	$16.66	Joseph H. Gee
8-28-32	7.15a	5.00p	7.50 PR	5.00	Louis M. Persons
		TOTAL		$21.66	[31]

Bill No. PRINCESS ALICE
28-599 at Tacoma, Wash.
9-12-32 *Stricken by stipulation—Paid*

8-25-32	6.45a	8.00a	$ 8.33	$ 4.16	Alfred Voligny
8-25-32	11.30p	12.30a	6.94	3.47	Leslie A. Sherby
8-25-32	11.30p	12.30a	6.94	3.47	William A. McNamara
		TOTAL		$11.10	

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
Bill No. 28-602 9-12-32			PRINCESS KATHLEEN at Vancouver, B.C.			
8-27-32	6.30p	7.30p	$ 6.94		$ 3.47	Alpheus M. Illman
8-28-32	6.30p	7.30p	6.94		3.47	Alpheus M. Illman
		TOTAL			$ 6.94	
Bill No. 28-604 9-12-32			PRINCESS MARGUERITE at Seattle, Wash.			
8-29-32	9.00p	11.00p	$ 7.50		$ 3.75	Howard E. Norwood
8-29-32	9.00p	11.00p	8.33		4.16	Alfred P. Smith
8-30-32	9.00p	11.30p	7.50	PR	1.87	Howard E. Norwood
8-30-32	9.00p	11.00p	8.33		4.16	Alfred P. Smith
8-31-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
8-31-32	9.00p	11.00p	8.33		4.16	Alfred P. Smith
		TOTAL			$21.85	
Bill No. 28-618 9-12-32			PRINCESS MARGUERITE at Seattle, Wash.			
9- 1-32	9.00p	11.00p	$ 8.33		$ 4.16	Alfred P. Smith
9- 1-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
9- 2-32	9.00p	11.00p	8.33		4.16	Alfred P. Smith
9- 2-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
9- 3-32	9.00p	11.00p	8.33		4.16	Alfred P. Smith
9- 3-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
9- 4-32	9.00p	11.00p	8.33		4.16	Alfred P. Smith
9- 4-32	9.00p	11.00p	7.50		3.75	Howard E. Norwood
		TOTAL			$31.64	

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No. 28-619 9-12-32		PRINCESS KATHLEEN at Seattle, Wash.			
9- 4-32	7.15a	5.00p	$ 7.50	PR$11.25	Howard E. Norwood (prorated)
9- 4-32	7.15a	9.15a	8.33	16.66	Alfred P. Smith
		TOTAL		$27.91	
Bill No. 28-622 9-12-32		PRINCESS KATHLEEN at Vancouver, B.C.			
9- 3-32	6.30p	7.30p	$ 7.50	$ 3.75	Henry T. Rowbottom
9- 4-32	6.30p	7.30p	7.50	3.75	Henry T. Rowbottom
9- 5-32	6.30p	7.30p	6.94	3.47	Walter E. Ainsley
		TOTAL		$10.97	[32]
Bill No. 28-627 9-13-32		SS NOOTKA at Tacoma, Wash. *Stricken by stipulation—Paid*			
9- 4-32	8.00a	9.00a	$ 8.33	$16.66	Alfred Voligny
		TOTAL		$16.66	
Bill No. 28-686 9-28-32		PRINCESS MARGUERITE at Seattle, Wash.			
9- 5-32	9.00p	12.45a	$ 9.72	PR$ 4.86	Joseph E. Spengler
9- 5-32	9.00p	11.00p	8.33	4.16	Alfred P. Smith
9- 5-32	9.00p	11.00p	6.94	3.47	Emerson E. David
9- 6-32	9.00p	10.30p	6.94	3.47	Emerson E. David
9- 6-32	8.30p	10.30p	7.50	3.75	Walter P. Harris

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
9- 7-32	8.30p	10.30p	6.94		3.47	Emerson E. David
9- 7-32	8.30p	10.30p	7.50		3.75	Walter P. Harris
9- 8-32	7.30p	10.30p	6.94	PR	3.47	Emerson E. David
9- 8-32	8.30p	10.30p	7.50		3.75	Walter P. Harris
9- 9-32	8.30p	10.30p	6.94		3.47	Emerson E. David
9- 9-32	8.30p	11.30p	7.50	PR	3.75	Walter P. Harris
9-10-32	8.30p	10.30p	6.94		3.47	Emerson E. David
9-10-32	8.30p	10.30p	7.50		3.75	Walter P. Harris
9-11-32	5.00p	10.30p	6.94	PR	3.47	Emerson E. David
9-11-32	8.30p	10.30p	7.50		3.75	Walter P. Harris
		TOTAL			$55.81	

Bill No. 28-683
9-28-32

PRINCESS KATHLEEN
at Seattle, Wash.

9- 5-32	7.15a (prorated)	5.00p	$ 8.33	PR	$11.10	Alfred P. Smith
9- 5-32	7.15a	5.00p	6.94	PR	10.41	Emerson E. David
9-11-32	8.00a	5.00p	6.94	PR	10.41	Emerson E. David
9-11-32	8.00a	5.00p	7.50		7.50	Walter P. Harris
		TOTAL			$39.42	

Bill No. 28-688
9-28-32

PRINCESS MARGUERITE
at Seattle, Wash.

9-12-32	8.30p	10.30p	$ 6.94	$ 3.47	Purley G. Hall
9-12-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
9-13-32	8.30p	10.30p	6.94	3.47	Purley G. Hall
9-13-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.
9-14-32	7.00p	10.30p	6.94	PR 3.47	Purley G. Hall
9-14-32	8.30p	10.30p	8.33	4.16	John P. Boyd, Sr.

Date of Service	Time Charged From	To	Basic pay per Diem		Amount Due	Names of Inspectors and other employees
9-15-32	8.30p	10.30p	6.94		3.47	Purley G. Hall
9-15-32	8.30p	10.30p	8.33		4.16	John P. Boyd, Sr.
9-16-32	8.30p	10.30p	6.94		3.47	Purley G. Hall
9-16-32	8.30p	10.30p	8.33		4.16	John P. Boyd, Sr.
9-17-32	8.30p	10.30p	6.94		3.47	Purley G. Hall
9-17-32	8.30p	10.30p	8.33		4.16	John P. Boyd, Sr.
9-18-32	5.00p	10.30p	6.94	PR	3.47	Purley G. Hall
9-18-32	8.30p	10.30p	8.33		4.16	John P. Boyd, Sr.
		TOTAL			$53.41	[33]

Bill No. 28-687 9-28-32 — PRINCESS KATHLEEN at Seattle, Wash.

9-18-32	8.00a	5.00p	$ 6.94	PR$10.41	Purley G. Hall
9-18-32	8.00a	5.00p	8.33	16.66	John P. Boyd, Sr.
		TOTAL		$27.07	

Bill No. 28-682 9-28-32 — PRINCESS KATHLEEN at Vancouver, B.C.

9-17-32	10.15p	11.15p	$ 6.94	$ 3.47	Alpheus M. Illman
		TOTAL		$ 3.47	

Bill No. 28-685 9-28-32 — PRINCESS MARGUERITE at Seattle, Wash.

9-19-32	8.30p	10.30p	$ 7.50	$ 3.75	Roy M. Porter
9-19-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
9-20-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
9-20-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
9-21-32	8.30p	10.30p	7.50	3.75	Roy M. Porter

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
9-21-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
9-22-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
9-22-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
9-23-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
9-23-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
9-24-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
9-24-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
9-25-32	8.30p	10.30p	7.50	3.75	Roy M. Porter
9-25-32	8.30p	10.30p	7.50	3.75	Herman F. Schwandt
9-25-32	8.30p	10.30p	9.72	4.86	Joseph E. Spengler
		TOTAL		$57.36	

Bill No. 28-684
9-28-32

PRINCESS KATHLEEN
at Seattle, Wash.

9-25-32	8.00a	5.00p	$ 7.50	PR$ 7.50	Herman F. Schwandt
9-25-32	8.00a	5.00p	7.50	PR 15.00	Roy M. Porter
		TOTAL		$22.50	

Bill No. 28-715
10-14-32

PRINCESS KATHLEEN
at Vancouver, B.C.

9-24-32	10.15p	11.15p	$ 7.50	$ 3.75	John A. Wallman
9-25-32	9.40p	11.40p	7.50	3.75	John A. Wallman
		TOTAL		$ 7.50	

[34]

Date of Service	Time Charged From	To	Basic pay per Diem	Amount Due	Names of Inspectors and other employees
Bill No.		PRINCESS MARGUERITE			
28–717		at Seattle, Wash.			
10–14–32					
9–26–32	8.30p	10.30p	$ 7.50	$ 3.75	Howard E. Norwood
9–26–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
9–27–32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
9–27–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
9–28–32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
9–28–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
9–29–32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
9–29–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
9–30–32	8.30p	10.30p	7.50	3.75	Howard E. Norwood
9–30–32	8.30p	10.30p	6.94	3.47	Ira L. Hazleton
		TOTAL		$36.10	

Total amount Due to September 30, 1932 $4331.13

Paid— 86.33

Revised total by Stipulation $4244.80

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 23, 1932. Ed. M. Lakin, Clerk, by S. Cook, Dputy. [35]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant, Canadian Pacific Railway Company, a foreign corporation, and in answer to the plaintiff's complaint, admits, denies and alleges as follows:

I.

The defendant admits the allegations in Paragraphs I, II and III of plaintiff's complaint.

II.

Defendant denies each and every allegation in Paragraph IV of plaintiff's complaint and particularly denies that $4,331.13 or any other sum has been earned as therein alleged.

By way of AFFIRMATIVE DEFENSE to plaintiff's complaint, the defendant alleges as follows:

I.

That it is provided in said act set forth in plaintiff's complaint that the same shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries when operating on regular schedules. That the vessels mentioned in plaintiff's complaint were at all [36] times in plaintiff's complaint mentioned and are now operated on regular schedules on the connecting waterway of Puget Sound and adjacent waters between ports in British Columbia and the port of Seattle and other ports in the State of Washington, designated as ports of entry, carrying passengers and automobiles as international ferries, and

that the defendant and said vessels are exempt from the overtime provisions of said act.

WHEREFORE, defendant prays that plaintiff take nothing and that this action be dismissed, and that judgment be entered for the defendant's costs and disbursements herein to be taxed.

BOGLE, BOGLE & GATES
Attorneys for Defendant. [37]

[Endorsed]: Filed Feb. 4, 1933. [38]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff and for reply to the Affirmative Defense of the Answer, alleges as follows:

I.

Answering Paragraph I, plaintiff denies each and every allegation therein contained and the whole thereof.

WHEREFORE, plaintiff prays for relief as prayed for in the original complaint.

ANTHONY SAVAGE
United States Attorney
HAMLET P. DODD
Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division.—ss.

HAMLET P. DODD, being first duly sworn, on oath deposes and says: That he is an Assistant

United States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the United States of America, plaintiff herein; that he has read the foregoing Reply, knows the contents thereof and believes the same to be true.

HAMLET P. DODD

Subscribed and sworn to before me this 9 day of February, 1933.

JEFFREY HEIMAN

Notary Public in and for the State of Washington.

Copy Received Feb. 9, 1933.

BOGLE, BOGLE & GATES

[Endorsed]: Filed Feb. 10, 1933. [39]

[Title of Court and Cause.]

STIPULATION WAIVING JURY TRIAL.

WITNESS the within stipulation entered into this day by and between the United States of America, plaintiff herein, by Anthony Savage, United States Attorney for the Western District of Washington, and Hamlet P. Dodd, Assistant United States Attorney for said District, and defendant Canadian Pacific Railway Company, by its attorneys, Bogle, Bogle & Gates by Norman M. Littell, whereby IT IS AGREED that trial by jury in the above entitled cause be waived, and that said cause be tried to the Court.

DATED at Seattle, Washington, this 26 day of September, 1933.

ANTHONY SAVAGE
United States Attorney
HAMLET P. DODD
Assistant United States Attorney
BOGLE, BOGLE & GATES
NORMAN M. LITTELL
Attorneys for Defendant.

[Endorsed]: Filed in Open Court at Time of Trial. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy

[Endorsed]: Filed Sep. 26, 1933. [40]

United States District Court, Western District of Washington, Northern Division.

No. 20730

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY, a foreign corporation,
Defendant.

JUDGMENT.

This cause coming on to be heard before the above entitled Court, the plaintiff being represented by Anthony Savage, United States Attorney for the Western District of Washington, and Hamlet P.

Dodd, Assistant United States Attorney for said District, and the defendant by Bogle, Bogle & Gates and Norman M. Littell, and the evidence having been presented, and the Court being duly advised in the premises; now, therefore, it is

ORDERED, DECREED and ADJUDGED that the defendant pay to the plaintiff herein FOUR THOUSAND TWO HUNDRED FORTY-FOUR and 80/100 ($4244.80) DOLLARS, same being overtime wages on various vessels of the defendant as shown in the complaint, together with the costs in said cause.

To the foregoing order and each and every part thereof, the defendant excepts and its exceptions are allowed.

DONE IN OPEN COURT this 6 day of November, 1933.

JEREMIAH NETERER,
United States District Judge.

Approved:
BOGLE, BOGLE & GATES,
NORMAN M. LITTELL,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 6, 1933. [41]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS.

This matter having come on regularly for hearing upon the motion of attorneys for the defendants, Messrs. Bogle, Bogle & Gates, for an order extend-

ing the time within which to file its bill of exceptions to the decision and ruling of the court in the above entitled cause, and good cause being shown therefor, and the court being duly advised in the premises; now, therefore,

IT IS ORDERED that the time for signing, allowance, and filing of the bill of exceptions of the above named defendant is hereby extended to the 20th day of December, 1933; and

BE IT FURTHER ORDERED that the present term of this court be and the same hereby is extended for said purposes and all other purposes incident or necessary to perfecting defendant's appeal until the expiration of said extended time.

Dated this 6th day of November, 1933.

JEREMIAH NETERER,
Judge.

Approved for entry:
ANTHONY SAVAGE,
HAMLET P. DODD,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 6, 1933. [42]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That heretofore, to-wit, on the 12th day of October, 1933, the above entitled cause came on for trial at Seattle, Washington, in the United States District Court for the

Western District of Washington, Northern Division, upon the issues joined herein before the Honorable Jeremiah Neterer, sitting as Judge of said court, without a jury, a jury having been duly waived by the parties by a written stipulation. [43]

Whereupon the plaintiff presented the following stipulation between the parties:

"1. That Exhibit "A" attached to the plaintiff's complaint is a true and correct statement of the overtime charges at issue in this case and may be admitted in evidence as such, it being understood and agreed however that all special or excursion trips by the defendant's vessel for which overtime inspection service was required should be deemed to be stricken from Exhibit "A" on the grounds that all charges for such trips have been paid, the excursion or special trips referred to are set forth on Exhibit "B" hereto attached and by this reference made a part hereof, the charges shown thereon having been paid by the defendant and shall be so marked Exhibit "A" in the original complaint.

2. That Exhibit "C", to-wit, a statement furnished by the Department of Labor, Bureau of Immigration, relative to immigration ports of entry in the United States, be admitted as the true and correct testimony of H. R. Landis, Special Supervisor, Bureau of Immigration, Department of Labor.

3. That a report from the Acting Commissioner of Immigration, Immigration District No. 28, relative to pages 12 and 13 of Exhibit "C", enlarging, correcting and supplementing the report of this District charges, be admitted as the true and correct

testimony of said Acting Commissioner of Immigration, said Exhibit being marked "C-1".

4. That the photographs marked "Exhibit D" and plans of the vessels involved in this case marked "Exhibit E", and steamship [44] schedule marked "Exhibit F", be admitted as true and correct representations of said vessels.

5. That steamship schedules marked Defendant's Exhibit 1, showing scheduled service of the defendant between Seattle, Vancouver and Victoria from April 17, 1931, to December, 1932, inclusive, may be admitted in evidence as a true and correct statement of said schedules during said period, and that the arrivals and departures circled in red ink indicate points at which overtime charges were made.

6. That Defendant's Exhibits No. 2, 3, and 4, representing the schedules of the Puget Sound Navigation Company's operations covering respectively the Bellingham-Victoria Service, the Bellingham-Anacortes and Sydney, B. C. service, and the Seattle-Victoria service, may be admitted in evidence as true and correct statements of the services set forth therein and of arrivals and departures at which overtime charges have been made, without prejudice to plaintiff's right to formal objection on the materiality of such evidence.

7. That Defendant's Exhibits No. 5 and 6, representing respectively the schedules of the Great Northern Railroad between Vancouver and Seattle and the North Coast Transportation Company motor coach schedule between the same points, may be admitted in evidence as true and correct statements

of the schedules therein shown, together with the arrival and departure points at which overtime service is rendered without charge for overtime service by the Immigration Inspection Service, without prejudice to plaintiff's right to formal objection on the materiality of such evidence.

8. That there may be introduced in evidence by counsel for the defendant folders or schedules and statements of steamship or ferry services, hereinbefore referred to in Plaintiff's Exhibit "C", as true and correct statements of the services therein [45] rendered and as correct statements and descriptions of the vessels rendering said services as to type of vessel, schedules, hours and other similar data which said schedules may contain.

9. That there may be introduced in evidence by counsel for the defendant any standard map of the United States or map showing the border line between Canada and the United States showing the ports of entry or other information stated in Plaintiff's Exhibit "C"." [46]

Thereupon, the plaintiff, to maintain the issue upon its part, introduced the following evidence, to-wit:

In pursuance of the foregoing stipulation, the following exhibits were presented by the plaintiff and admitted in evidence without objection:

Plaintiff's Exhibits A and B: Exhibit A is a true and correct statement of the charges made against the defendant in this suit for overtime

immigration inspection services rendered in examining passengers entering the United States from Vancouver or Victoria, B. C. on the defendant's vessels, excepting only those items marked "Stricken" on Exhibit A and enumerated in Exhibit B, representing charges for special trips or excursions of defendant's vessels while not operating on regular schedules. Charges stated on Exhibit B were confessed and paid by the defendant.

Plaintiff's Exhibits C and C-1: Statement furnished by the Department of Labor, Bureau of Immigration, of which Exhibit C-1 is a supplemental statement correcting and enlarging the statement of Exhibit C as to Immigration District No. 28, embracing ports of entry in the Puget Sound area. These statements describe the services rendered by the United States Immigration Inspection Service and overtime charges, if any, at all ports of entry into the United States along the Canadian or Mexican border lines, and were admitted as the true and correct testimony of H. R. Landis, Special Supervisor, Bureau of Immigration, Department of Labor. It was stipulated that testimony in regard to ports of entry on the Mexican border had no material bearing on the case and it is therefore omitted from the record. This statement covers the fiscal year ending June 30, 1932, and shows the following facts:

Immigration inspection service is maintained at all ports [47] of entry along the border between Canada and the United States, a total of 108 in number, the location of said ports being indicated on the map admitted in evidence as defendant's Ex-

hibit 7, printed for convenience on the succeeding page. That all forms of transportation moving between Canada and the United States passed through the various ports of entry shown on the said map, and that all vehicles carrying passengers to the United States, to-wit, railroad trains, auto stages, private vehicles of all sorts, airplanes and vessels on the Great Lakes and connecting waterways, are met at ports of entry where they arrive and passengers thereon are examined by United States Immigration Inspectors before admission to the United States, to determine their qualifications for entry into this country.

That the hours of service of the United States Immigration Inspectors maintained at said ports of entry vary from eight to twenty-four hours per day, with one, two, or three shifts of inspectors at each port. That the number of working hours maintained at each port by Immigration Inspection Service, the type of traffic examined and the number of applicants examined for the fiscal year ending June 30, 1932, are as follows (including services maintained in five offices in Dominion of Canada, also given in Exhibit C):

Port of Entry	Hours of Service	Traffic Examined	Applicants Examined, Fiscal Year Ending June 30, 1932
Dist. No. 3			
Yarmouth, N. S.	24 or 16 hours	Pre-examination passengers Eastern Steamship Lines to New York and Boston on Dominion-Atlantic Railway trains to Yarmouth	
			[48]
Halifax, N. S.	Time not stated	Pre-examination trans-Atlantic passengers to U. S.	
St. Johns, N. B.	16 or 24 hours	Pre-examination steamship passengers to New York and Boston	23,373
Eastport, Me.	Time not stated	Steamers to and from Grand Manan Island, 3 ferries daily from Campo Bello Island, private boats	40,316
Calais	24-hr. service	4 international bridges railroad trains	1,838,384
Vanceboro	24-hr. service	Free bridge; railroad trains	103,304
Houlton	24-hr. service	railroad train; mostly highway traffic	335,700
Fort Fairfield	16-hr. service	railroad trains; mostly highway traffic	109,190
Limestone	16-hr. service	all highway traffic	45,704
Van Buren	24-hr. service	Free bridge traffic	323,859
Madawaska	24-hr. service	Free bridge traffic	544,659
Fort Kent	16-hr. service	Free bridge traffic	166,086
Jackman	24-hr. service	Railroad trains and highway traffic	134,525
Arnold Pond	8-hr. service	Highway traffic	14,510

Port of Entry	Hours of Service	Traffic Examined	Applicants Examined, Fiscal Year Ending June 30, 1932
Dist. No. 1 (Headquarters, Newport, Vt.)			
Beecher Falls, Vt.	16-hr. service	Highway traffic	208,743
Island Pond and Norton, Vt.	24-hr. service	Railway trains and highway traffic	Not stated
Derby Line, Vt.	24-hr. service	Highway traffic	357,870 [49]
Newport, Vt.	24-hr. service	Railroad trains	59,270
North Troy, Vt.	24-hr. service May to November inclusive: 16-hr. service December to April	Railway trains and highway traffic	108,067
East Richford, Vt.	8-hr. service	Highway traffic	35,375
Richford, Vt.	16-hr. service	Highway traffic	113,234
West Berkshire, Vt.	8-hr. service	Highway traffic	28,698
Franklin, Vt.	8-hr. service	Highway traffic	21,671
Swanton, Vt.	24-hr. service	Highway traffic	381,381
St. Albans, Vt.	16-hr. service	Railway trains	60,857
Alburg, Vt.	24-hr. service	Highway traffic	62,864
Rouses Point, N. Y.	16-hr. service	Railway and highway traffic, freight steamers and private boats and airplanes	440,134
Champlain, N. Y.	24-hr. service	Highway traffic	184,840
Mooers, N. Y.	16-hr. service	Highway traffic	40,648
Chateaugay, N. Y.	16-hr. service	Highway traffic	40,897
Malone, N. Y.	16-hr. service	Railroad trains	26,809
Trout River, N. Y.	24-hr. service	Highway traffic	171,553
Port Covington, N. Y.	16-hr. service	Highway and railroad traffic	75,638
Nyando, N. Y. (Cornwall, Ont.)	8-hr. service	Railroad trains	67,197
Louisville Landing, N. Y.	8-hr. service	Ferry service	11,350
Waddington, N. Y.	14-hr. service	Ferry service	29,895

Port of Entry	Hours of Service	Traffic Examined	Applicants Examined, Fiscal Year Ending June 30, 1932
Ogdensburg, N. Y.	18-hr. service	Ferry service	199,678
Morristown, N. Y.	16-hr. service	Ferry service	62,616
Alexandria Bay, N. Y.	8-hr. service	Ferry service	137,858
			[50]
Clayton, N. Y.	8-hr. service	Ferry service and private boats	52,438
Cape Vincent, N. Y.	8-hr. service	Ferry service	14,971
Montreal, Que.	Not stated	Pre-examination of residents of Canada and trans-Atlantic passengers to U. S.	Not stated
Quebec, Que.	Not stated	Pre-examination of Canadian residents and trans-Atlantic passengers	Not stated
Dist. No. 4 (Headquarters at Ellis Island, N. Y.)			
Albany, N. Y.	Not stated	Mail and passenger plane service	Not stated
Dist. No. 5 (Headquarters at Buffalo, N. Y.)			
Rochester, N. Y.	8-hr. service	Steamships, passenger and freight, also ferry traffic	22,205
Niagara Falls, N. Y.	14-hr. service	Railway trains, highway traffic and airplanes, 2 bridges	Not stated
Buffalo, N. Y.	16-hr. service	Railway trains, highway traffic and airplanes, 1 bridge	3,714,823
Erie, Pa.	24-hr. service	Steamships, passenger and freight	15,502
Cleveland, O.	8-hr. service July to Sept.	Steamship traffic	6,849
Dist. No. 11 (Headquarters at Detroit, Mich.)			
Sandusky, O.	Not stated	Fishing boats and passenger vessels	Not stated
Detroit, Mich.	24-hr. service	Railway trains, ferries planes and freight steamers	6,778,683
			[51]

Port of Entry	Hours of Service	Traffic Examined	Applicants Examined, Fiscal Year Ending June 30, 1932
Algonac, Mich.	14-hr. service	Ferry service	44,603
Roberts Landing, Mich.	14-hr. service	Ferry service	33,093
Marine City, Mich.	14-hr. service	Ferry service	23,729
St. Clair, Mich.	14-hr. service	Ferry service	15,668
Port Huron, Mich.	18-hr. service	Railroad trains and ferry	562,342
Sault Ste. Marie, Mich.	8-hr. service	Railway trains, ferries and freight steamers	Not stated
Dist. No. 14 (Headquarters at Chicago, Ill.)			
Gary, Ind.	Not stated	Freight steamers	
Chicago, Ill.	Not stated	Freight steamers	
Milwaukee, Wis.	Not stated	Freight steamers	
Dist. No. 18 (Grand Forks, N. D.)			
Duluth, Minn.	Not stated	Freight steamers Sunday and holiday passenger steamers	4,092
Mineral Center, Minn. (Pigeon River Bridge)	Not stated	Highway traffic, passenger and freight steamers	50,764
Ranier, Minn.	14-hr. service	Railway trains and ferry. Pedestrians on railroad bridge	11,998
International Falls, Minn.	24-hr. service	Toll bridge	273,197
Baudette, Minn.	Not stated	Railway traffic and ferry	35,894
Warroad, Minn.	18-hr. service	Railway trains and highway traffic	19,079
Richardson's Bridge, Minn.	8-hr. service	Highway traffic	2,971
			[52]
Pine Creek, Minn.	8-hr. service	Highway Traffic	6,248
Noyes, Minn.	24-hr. service	Highway traffic and railroad trains	102,875
Pembina, N. D.	24-hr. service	Highway traffic, trains and airplanes	63,046

Port of Entry	Hours of Service	Traffic Examined	Applicants Examined, Fiscal Year Ending June 30, 1932
Neche, N. D.	16-hr. service	Highway and railroad train traffic	32,830
Walhalla, N. D.	8-hr. service	Railroad and highyay traffic	7,109
Hannah, N. D.	8-hr. service	Highway traffic	5,915
Sarles, N. D.	8-hr. service	Highway traffic	3,954
St. John, N. D.	16-hr. service	Railroad and highway traffic	14,331
Dunseith, N. D.	8-hr. service	Highway traffic	4,523
Carbury, N. D.	8-hr. service	Highway traffic	3,906
Westhope, N. D.	8-hr. service	Highway traffic	7,278
Sherwood, N. D.	8-hr. service	Highway traffic	34,469
Portal, N. D.	14-hr. service	Railroad and highway traffic	99,328
Noonan, N. D.	8-hr. service	Highway traffic	14,831
Ambrose, N. D.	8-hr. service	Highway traffic	15,834
Westby, Mont.	8-hr. service	Highway traffic	3,155
Raymond, Mont.	8-hr. service	Highway traffic	3,433
Whitetail, Mont.	8-hr. service	Highway traffic	3,790
Scobey, Mont.	8-hr. service	Highway traffic	5,649
Opheim, Mont.	8-hr. service	Highway traffic	2,644
Winnepeg, Man.	Not stated	Railroad traffic	13,608
Turner, Mont.	Not stated	Railroad traffic	2,015
Havre, Mont.	8-hr. service	Highway traffic	2,784
Sweetgrass, Mont.	16 to 24 hr. service	Railroad and highway traffic	112,046 [53]
Babb (Piegan), Mont.	8-hr. service	Highway traffic	20,037
Rooseville, Mont.	8-hr. service	Highway traffic	4,960
Gateway, Mont.	8-hr. service	Railroad and highway traffic	5,310
Eastport, Ida.	12 to 24 hour service	Railroad and highway traffic	24,466
Porthill, Ida.	8-hr. service	Highway traffic	14,938
Metaline Falls, Wash.	8-hr. service	Highway traffic	11,646
Northport, Wash.	8-hr. service	Highway and railroad traffic	10,395

Port of Entry	Hours of Service	Traffic Examined	Applicants Examined, Fiscal Year Ending June 30, 1932
Laurier, Wash.	8-hr. service	Railroad and highway traffic	8,562
Danville, Wash.	8-hr. service	Railroad and highway	8,562
Ferry, Wash.	Not stated	Highway traffic	2,370
Oroville, Wash.	16-hr. service	Highway traffic	28,090
Spokane, Wash.	8-hr. service	Airplane traffic	Not stated
Blaine, Wash.	Peach Arch, 16-hr. service, Pacific Highway 24 hours summer and 18 hours winter	Highway traffic and railroad trains	468,166
Lynden, Wash.	15-hr. service	Highway traffic	24,887
Sumas, Wash.	16-hr. service	Railroad trains and highway traffic	169,564
Port Angeles, Wash.	10-hr. service	Ferry service to Sydney, B. C. (Overtime charged against PSN Co. ferries operating daily on regular schedule)	23,058
Anacortes, Wash.	8-hr. service	Steamers and PSN Co. ferries to Sydney, B. C. (Overtime charged against PSN Co. ferries operating daily on regular schedule)	6,582
Bellingham, Wash.	8-hr. service	Miscellaneous steamers and Bellingham-Victoria ferry service of PSN Co. (Overtime charged against PSN Co. ferries operating daily on regular schedule)	7,857

[54]

Port of Entry	Hours of Service	Traffic Examined	Applicants Examined, Fiscal Year Ending June 30, 1932
Aberdeen, Wash.	8-hr. service	Ocean steamers	Not stated
Tacoma, Wash.	8-hr. service	Miscellaneous ocean traffic	Not stated
Seattle, Wash.	8-hr. service	Canadian Pacific (defendant's) vessels from Victoria and Vancouver, N. C.	71,540
		P. S. N. Co.	7,119
		All others	147

That across the entire border line at all of the foregoing ports, no overtime charges are collected or demanded by the Immigration Inspection Service for overtime services rendered in examining passengers arriving in the United States upon railroad trains[1], automobile stages, aircraft, vessels on the Great Lakes and connecting waterways operating on regular schedules, or for overtime services rendered in examining passengers arriving through tunnels or over bridges connecting Canada and the United States. That the only ports of entry at which charges have been made for inspection services on carriers running on regular schedules between Canada and the United States having arrivals at

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Footnote[1]: Excluded from consideration as immaterial in the case are the charges for overtime services rendered by inspectors who go up into Canada to make inspections while riding on railroad trains bound for the United States, such extra services being for accommodation of carriers and passengers to prevent delay at ports of entry and not included herein.

ports of entry after 5 P. M. and before 8 A. M. are (1) the ports on Puget Sound, to-wit, Port Angeles (Victoria, B. C.-Port Angeles ferries), Anacortes (Sidney, B. C.-Anacortes ferries), Bellingham (Sidney, B. C.-Bellingham ferries), and Seattle; (2) ports on the east coast of the United States where coastwise vessels ply between Yarmouth and Halifax, [55] N. S., St. Johns, N. B., and Boston and New York. That the vessels last referred to are those of the Eastern Steamship Company leaving Yarmouth and Halifax, N. S. daily during the three months tourist season, and from two to four times a week during the remaining nine months of the year, and leaving St. Johns for Boston and New York three times a week during the tourist season and twice a week for the balance of the year.

That all of the regular scheduled arrivals at the ports in the Puget Sound area first mentioned above, to-wit, Port Angeles, Anacortes, Bellingham and Seattle, are arrivals of Puget Sound Navigation Company ferries plying between such ports and Victoria or Sidney, B. C. on Vancouver Island, with the exception of the arrivals of defendant's vessels at the Port of Seattle from Victoria or Vancouver, B. C.

Plaintiff's Exhibit D: Photographs of defendant's vessels operating on Victoria-Seattle schedule.

Plaintiff's Exhibit E: Plans of defendant's vessels operating on Victoria-Seattle schedule.

Plaintiff's Exhibit F: Schedule of operations of defendant's vessels operating on Victoria-Seattle-Vancouver-Seattle schedules, showing the gross tonnage, passenger capacity and number of staterooms. [56]

Whereupon the plaintiff called

OSCAR W. DAMM,

Deputy Collector of Customs at the Port of Seattle, who testified that the three vessels of the defendant involved in this suit, the "PRINCESS MARGUERITE", "PRINCESS KATHLEEN" and "PRINCESS CHARLOTTE", were daily entered and cleared by the witness as they came in and went out of the Port of Seattle. Mr. Damm testified that the vessels were classified by the Steamboat Inspection Service as foreign passenger vessels.

Whereupon the plaintiff rested and the defendant, to sustain the issues on its part, introduced the following evidence:

In pursuance of the stipulation appearing above defendant introduced the following exhibits, which were admitted without objection:

Defendant's Exhibit 1: Schedules of the "PRINCESS MARGUERITE", "PRINCESS KATHLEEN", and "PRINCESS CHARLOTTE" running between Seattle and Victoria, B. C. With slight and immaterial changes in the time of departure and arrival, the said vessels operated during all of the period in controversy on the schedules stated below, the arrivals FOR WHICH OVERTIME IS CHARGED against the defendant being shown in Italics:

Lv. Victoria, B. C.	4:30 P. M.	Lv. Vancouver, B. C.	11:30 P. M.
Arr. Seattle	*9:00 P. M.*	*Arr. Seattle*	*8:00 A. M.*
Lv. Seattle	9:00 A. M.	Lv. Seattle	11:30 P. M.
Arr. Victoria, B. C.	1:15 P. M.	Arr. Vancouver, B. C.	8:00 A. M.

Defendant's Exhibit 2: Puget Sound Navigation Company's schedule of ferry service between Bellingham, Washington, and Victoria, B. C., and between Port Angeles, Washington, and Victoria, B. C., the daily arrival at Port Angeles requiring overtime inspection service and FOR WHICH OVERTIME IS CHARGED against the Navigation Company being shown in Italics:

Lv. Victoria, B. C.	8:00 A. M.
Arr. Bellingham	12:00 Noon
Lv. Bellingham	12:30 P. M.
Arr. Victoria	4:30 P. M.
Lv. Victoria	5:00 P. M.
Arr. Port Angeles	*6:40 P. M.*
Lv. Port Angeles	7:15 P. M.
Arr. Victoria	8:55 P. M.

Defendant's Exhibit 3: Puget Sound Navigation Company schedule for ferry service between Bellingham, Anacortes and Sidney, B. C., showing that the ferries "CITY OF ANGELES" and "ROSARIO" depart from Anacortes and Bellingham each morning at 6:30 A. M. and 10:45 A. M., respectively, for Sidney, B. C. and leave Sidney, B. C. at 11:15 A. M. and 4:30 P. M., respectively, and arrive at the port of entry, Anacortes, at 2:35 P. M. and *9:00 P. M.,* respectively, daily, the last arrival requiring overtime immigration inspection service, FOR WHICH OVERTIME IS CHARGED.

Defendant's Exhibit 4: Puget Sound Navigation Company schedule of Seattle-Victoria service of the S. S. "IROQUOIS", showing a daily de-

parture from Seattle for Victoria at midnight, and a daily departure from Victoria, B. C. for Seattle at 10:15 A. M. and arrival in Seattle daily at or about *6:00 P. M.,* which said arrival requires overtime immigration inspection service FOR WHICH OVERTIME IS CHARGED against the aforesaid company. [58]

Defendant's Exhibit 5: Showing Great Northern Railroad schedule of trains between Seattle and Vancouver, showing two trains daily to Vancouver from Seattle and two trains daily from Vancouver at 8:30 A. M. and 5:30 P. M. respectively, arriving at port of entry, Blaine, at 9:55 A. M. and *6:55 P. M.* respectively, the last arrival requiring overtime immigration inspection service FOR WHICH NO OVERTIME HAS EVER BEEN CHARGED against the Great Northern Railroad Company.

Defendant's Exhibit 6: Schedule of the North Coast Transportation Company operating auto stages between Vancouver and Seattle, Washington, showing six passenger stages per day from Seattle to Vancouver and six stages from Vancouver to Seattle, operating on regular schedules, three of which arrive at port of entry, Blaine, Washington, *after 5:00 P. M.,* requiring overtime immigration inspection service, FOR WHICH NO OVERTIME HAS EVER BEEN CHARGED against the North Coast Transportation Company.

Defendant's Exhibit 7: Map of the United States-Canadian border line, with the locations of ports of entry mentioned in plaintiff's Exhibits C and C-1, the ports at which NO OVERTIME IS

CHARGED against carriers operating on regular schedules and arriving after 5:00 P. M. and before 8:00 A. M. being shown by red marks, and ports of entry at which OVERTIME IS CHARGED being shown by a blue circle. [59]

Defendant's Exhibit 8: A chart of Puget Sound, showing Vancouver Island and the main highway thereof terminating at Victoria, B. C., and the route of the defendant's vessels to Seattle from Victoria; showing also the runs of the Puget Sound Navigation Company ferries mentioned in Exhibits 2, 3 and 4; also the Great Northern Railway and North Coast Transportation Company route between Vancouver and Seattle.

Defendant's Exhibit 9: Showing schedules of steamship services on the Great Lakes and connecting waterways, Canadian steamship lines, Cleveland & Buffalo Steamship Line, Northern Navigation Company; showing vessels arriving at ports of entry on the Great Lakes, mentioned in plaintiff's exhibits C and C-1, for which no overtime charge is made for inspection of passengers against vessels operating on regular schedules, and showing routes of vessels from Canadian ports to American ports of entry, varying from 196 miles over Lake Superior from Port Arthur, Ontario, to Duluth, Minnesota, to 42 miles over Lake Ontario from Toronto, Ontario, to Buffalo, New York.

Defendant's Exhibit 10: Eastern Steamship Company schedules showing vessels and services mentioned in plaintiff's exhibits C and C-1, testimony of H. R. Landis, showing ocean-going coastwise vessels

operating between Halifax and Yarmouth, Nova Scotia, and St. Johns, New Brunswick, the distances traveled being as follows:

Yarmouth, N. S. to New York.....461 miles
Yarmouth, N. S. to Boston.....237 miles
St. Johns, N. B. to Boston.....286 miles

and the vessels rendering the service being of the following sizes and capacities: [60]

Name	Displacement Tonnage	Number of Berths
S. S. "ACADIA"	10,000 Tons	750
S. S. "YARMOUTH"	7,000 Tons	750
S. S. "EVANGELINE"	7,000 Tons	750
S. S. "SAINT JOHN"	10,000 Tons	750

This exhibit also shows scores of coast towns at which the vessels of the line stop along the route, showing the coastwise character of the service.

Defendant's Exhibit 11: Committee reports in the House of Representatives and United States Senate (S. 1126; H. R. 3309), reporting favorably on Overtime Act and showing the purpose thereof, to wit, that the act was aimed at the arrival of an increasing number of ocean vessels and passengers thereon at irregular, unanticipated hours after 5:00 P. M. and before 8:00 A. M., requiring special overtime service from United States Immigration Inspectors, both reports citing the following figures, among others:

"The following summary for the month of March, 1930, at the Port of New York, is both

recent and informative on the subject of overtime—

Arriving passenger steamers from foreign ports requiring assignment of immigration inspectors	278
Number of same requiring overtime duty	41
Number of inspectors performing overtime, each occasion	1 to 16
Total number of overtime hours in which inspection occurred	130
Grand total hours of overtime of all inspectors	833"

Defendant's Exhibit 12: Regulations of the Department of Labor, Bureau of Immigration, pertaining to administration of the Overtime Act at issue, and Comptroller General's decision construing the same.

Defendant's Exhibit 13: Pictures of defendant's vessels [61] used on Seattle-Victoria run, showing handling of vehicular traffic and deck space therefor and method of ingress and egress.

Defendant's Exhibit 14: Plans of automobile decks showing accommodations for vehicular traffic on each vessel.

Defendant's Exhibit 15: Showing the following traffic carried between Victoria and Seattle and Vancouver and Seattle between March 1, 1932, and February 28, 1933:

PASSENGERS CARRIED

Month		4:30 PM Vic. Sea.	9:00 AM Sea. Vic.	9:00 AM Sea. Van.	11:40 PM Van. Sea.	1:00 AM Vic. Sea.	11:30 PM Sea. Van.
March	1932	1,358	1,048	322	833	—	943
April	1932	1,412	1,249	377	656	—	970
May	1932	2,577	2,403	584	499	707	939
June	1932	2,490	2,332	1,979	664	610	1,299
July	1932	4,534	4,721	2,504	788	826	1,410
August	1932	3,789	3,917	3,870	741	902	1,571
Sept.	1932	3,614	3,118	1,254	865	286	1,276
Oct.	1932	1,463	1,234	522	744	—	824
Nov.	1932	1,247	1,120	211	579	—	875
Dec.	1932	1,336	1,282	181	542	—	776
Jan.	1933	1,001	805	172	617	—	700
Feb.	1933	709	602	165	483	—	561
Totals		25,530	23,831	12,141	8,011	3,331	12,144

Total passengers from Vancouver and Victoria to Seattle.....45,387

Total passengers from Seattle to Vancouver and Victoria.....48,116

AUTOMOBILES CARRIED

Month		4:30 PM Vic. Sea.	9:00 AM Sea. Vic.	9:00 AM Sea. Van.	11:40 PM Van. Sea.	1:00 AM Vic. Sea.	11:30 PM Sea. Van.
March	1932	49	37	—	5	—	11
April	1932	73	54	3	11	—	11
May	1932	131	110	1	9	45	6
June	1932	129	96	2	7	40	13
July	1932	247	192	4	15	53	9
Aug.	1932	231	195	10	7	86	13
Sept.	1932	219	138	2	15	26	13
Oct.	1932	88	68	3	12	—	5
Nov.	1932	45	44	—	14	—	7
Dec.	1932	38	34	—	5	—	3
Jan.	1933	29	15	—	12	—	9
Feb.	1933	31	21	—	9	—	3
Totals		1,310	1,004	25	121	250	103

[62]

Total automobiles from Vancouver and Victoria to Seattle.....1,498

Total automobiles from Seattle to Vancouver and Victoria.....1,132

Defendant's Exhibit 16: Defendant's folder advertising ferry service in the waters of Puget Sound, said folder showing, among other things, a map with "Ferry Routes" marked thereon, to and from Vancouver Island and the mainland on the Canadian and the American sides. Said folder invites travelers to "drive your car on board", states the schedules shown in defendant's Exhibit 1, and shows the automobile rates from Seattle to Victoria, Seattle to Vancouver, and between other points.

Defendant's Exhibit 17: Schedule showing the relation of overtime charges to revenues derived from the passenger business of the defendant's vessels from January to June inclusive of 1932. [63] Said schedule shows the following totals:

Total passengers from Victoria and Vancouver, B. C. to Seattle	19,659
Total passenger revenues	$46,465.55
Total overtime bills	$ 2,127.53
Ratio, overtime charges to gross revenue	4½%

Defendant's Exhibit 18: Pictures of Puget Sound Navigation Company vessels referred to in Exhibits 2, 3 and 4, to-wit, Puget Sound Navigation Company ferries, plying between Bellingham and Victoria and Port Angeles and Victoria, between Anacortes and Sidney, B. C., and between Seattle and Victoria.

Defendant's Exhibit 19: Rules and regulations of the Board of Supervising Inspectors—

Bays, Sounds and Lakes, other than the Great Lakes (March 2, 1931).

This book of regulations issued by the United States Department of Commerce for the Steamboat Inspection Service contains in Rule VII, page 126, the entire regulations in regard to "Ferry Boats". The only requirement specified for the qualification of a vessel as a "ferry" is that—

> "All ferry boats of more than seventy-five gross tons carrying passengers for hire, the construction of which is commenced after March 31, 1913, shall be supplied with a sufficient number of water-tight bulkheads to float the vessel if any compartment is flooded."

The balance of the regulation provides that life-saving equipment shall be approved by the Steamboat Inspectors, that there shall be life preservers on board for all persons, that fire apparatus shall be provided as on any passenger steamer of equal size.

Whereupon the defendant called

Captain CYRIL NEROUTSOS,

who being first duly sworn on oath said that he was the [64] manager of the British Columbia Steamship Service of the Canadian Pacific Railway Company, operating the vessels involved in this case. Captain Neroutsos, after testifying as to the fore-

(Testimony of Captain Cyril Neroutsos.)

going position and his services for the company since 1911, as either Marine Superintendent or General Manager, testified as follows:

That defendant's Exhibit 1 is a true statement of the schedules of the defendant's vessels operating in Puget Sound during the period involved in this controversy. That the direct run from Victoria, B. C. to Seattle and return, leaving Victoria at about 4:30 P. M. and arriving at Seattle at 9:00 P. M., had been established in 1903 and had been maintained ever since as a daily schedule with slight variations in the hour of departure and arrival. That defendant's exhibit 13 includes pictures of the defendant's vessels "PRINCESS CHARLOTTE", "PRINCESS KATHLEEN", and "PRINCESS MARGUERITE", as shown thereon, showing the main deck or automobile deck, and the approach and method by which automobiles are embarked and disembarked at Victoria and Seattle. That the "PRINCESS KATHLEEN" and "PRINCESS MARGUERITE" were built for this particular purpose of carrying a large number of passengers and their automobiles, if any, and to operate in the inland waters of Puget Sound, particularly between Seattle and Victoria. That said vessels receive the automobile traffic from Victoria on Vancouver Island and transport the same to Seattle and vice versa. That the traffic is a part of the current of passenger and automobile traffic from the mainland to Nanaimo on Vancouver Island, down the highway to Victoria and thence to Seattle

(Testimony of Captain Cyril Neroutsos.)
or vice versa from Vancouver down the mainland to Seattle and thence to Victoria and up the Vancouver Highway.

That in reference to the charts of Puget Sound waters (defendant's Exhibit 8), all points shown on the charts, to-wit, [65] Bellingham, Anacortes, Seattle and Port Angeles on the American side of the border line, and Victoria, Sidney and Nanaimo on Vancouver Island and Vancouver on the mainland, were all connections of the various routes operated in the district on the waters of Puget Sound, and that the Puget Sound Navigation Company routes and those of the defendant were interlocking routes. That the companies operating over these routes between the various points interchange tickets and passengers with each other, to the end that they are linked one with he other, rendering the same automobile ferry service to and from all of the points named by means of the vessels pictures in plaintiff's Exhibit D and defendant's exhibits 13, 14 and 18.

That the defendant had a cooperating arrangement with the Puget Sound Navigation Company in the operation of these international services and that the defendant had transported passengers and their cars from Victoria to Seattle during all the years since the service was put into effect in 1903, although the automobile traffic had greatly increased in recent years. That the automobiles of passengers were handled by driving the car on the defendant's vessels, the passenger being given a baggage check

(Testimony of Captain Cyril Neroutsos.)

therefor. That the automobiles are handled as the personal baggage of the owner. That the car enters the ships of the deefndant just as it left the highway, with gasoline in the car, and with the ignition of the car not disconnected.

That the customary method of handling automobiles on ocean-going vessels is to have the car drained of gasoline, hoisted up and lowered into the ship's hold and booked as freight, and not as passenger baggage. That a bill of lading is usually issued for such a shipment and in many cases the cars are crated.

That in respect to the vessels of the Eastern Steamship [66] Company, referred to in defendant's Exhibit 10, operating between Halifax and St. Johns, New Brunswick, and Yarmouth, Nova Scotia, and coast ports of the United States, these vessels were steamships built of a heavy structure forward for ocean-going travel; that the bulkhead from the forecastle head to the passenger accommodations were built of heavy steel construction to resist heavy seas, just as in the case of trans-Atlantic vessels. That the Eastern Steamship Company vessels, "YARMOUTH" and "EVANGELINE" (7,000 tons displacement), and the "ST. JOHNS" and "ARCADIA" (10,000 tons displacement) were built for and operated in ocean-going operations, whereas the vessels of the defendant here at issue are an evolution of the steamboat or small steamers which formerly operated in Puget Sound, side-wheelers and stern-wheelers which did not have to suffer any great stress of weather and

(Testimony of Captain Cyril Neroutsos.)
ran on short routes. That the vessels of the defendant are constructed for inland waters only and that the vessels are constructed with open salon decks opening out on the main deck and surrounded by glass windows looking out over the fore deck. That said construction could never stand heavy seas but was for sheltered inland waters and short runs. That furthermore, the vessels of the defendant company were from 2,000 to 3,000 tons smaller than the vessels of the Eastern Steamship Company plying in the North Atlantic. The latter vessels have 750 berths, whereas the defendant's vessels have from 206 to 290 berths. That the defendant's vessels, constructed in Scotland, had to be brought to this port under a special permit, were not permitted to carry passengers, and that the window and forward bulkhead had to be protected with steel and heavy lumber to protect them from the sea during the voyage from Scotland to this port.

That the plans contained in the folio marked "Exhibit 14" [67] show the main deck plans of the defendant's vessels for the accommodation of automobiles.

Whereupon the defendant called

Mr. H. W. SCHOFIELD,

who testified as follows; after being first duly sworn:

That he was the District Passenger Agent for the Canadian Pacific Railway Company and the British

(Testimony of Mr. H. W. Schofield.)

Columbia Coastal Steamship Service and had occupied that position since 1926 and prior to that time had served as chief clerk, same department, where he had been employed by the defendant company for 21 years. That Exhibit 15 had been prepared under his supervision and instruction and was a correct statement of the automobile and passenger traffic between Seattle and Victoria, B. C. and correctly represented all other information contained in said exhibit.

That Exhibit 16 represented a schedule of the defendant offered to the public showing its various services on Puget Sound and inviting the public to use the ferry service provided for automobiles and passengers to points indicated therein. That said advertising matter as well as other forms of advertising matter were distributed and broadcast throughout the Pacific Coast region.

That defendant's Exhibit 17 showing the passenger revenues from January to June, 1932, on defendant's vessels from Victoria and Vancouver to Seattle, compared to the overtime charges made as charged in this suit, showed the overtime charges to be four and one-half per cent of the gross revenues.

Whereupon the defendant called

Captain A. M. PEABODY,

who testified as follows, after being first duly sworn: [68]

(Testimony of Captain A. M. Peabody.)

That he was the President of Puget Sound Navigation Company and had served in that capacity since 1929, and prior thereto had been Vice-President and Secretary of the company since 1926. That the witness had been at sea about ten years prior thereto and had an unlimited master's license.

That the Puget Sound Navigation Company was entirely separate and independent of and competitive with the defendant company but that both companies rendered similar services in the same territory and performed the same service to the public. That the tickets of the defendant company and the Puget Sound Navigation Company were interchangeable, so that passengers could travel on either line of vessels.

That defendant's Exhibits 2, 3 and 4 correctly represented the operating schedules of the Puget Sound Navigation Company ferries between Anacortes, Bellingham and Sidney, Port Angeles and Victoria, Seattle and Victoria.

That Exhibit 18 showed the ferries "ROSARIO", "CITY OF ANGELES", "PUGET", "IROQUOIS" and "OLYMPIC", built to render ferry service between the points indicated in British Columbia and Puget Sound ports; that the routes marked in blue pencil on defendant's Exhibit 8 were those representing international ferry operations of Puget Sound Navigation Company. That the Puget Sound Navigation Company advertised to the public that ferry service for passengers and vehicles would be supplied to and from all of said points.

(Testimony of Captain A. M. Peabody.)

That the aforesaid vessels of the Puget Sound Navigation Company were classified as "ferry vessels" by the United States Steamboat Inspection Service and that the witness was familiar with the requirements of United States Steamboat Inspection Service for classifying vessels as ferries; that the Puget Sound Navigation Company had had vessels changed from the classification of [69] "passenger vessels" to that of "ferry vessels" in pursuance of Rule VII of the Regulations of the Steamboat Inspection Service (Ex. 19, p. 126). That the only requirement of the Steamboat Inspection Service in changing a vessel from passenger vessel to ferry vessel was that the vessel have water-tight compartments so that any one of the compartments could be filled with water and the vessel would remain afloat, and that an inspection was made to determine whether the bulkheads dividing the vessel were water-tight in accordance with these regulations. That in lieu of bulkheads the Steamboat Inspection Service permitted air tanks for buoyancy to be placed in the ship and would still classify it as a ferry vessel. That there is no requirement whatsoever as to the form, shape, construction of the vessel (except as to the bulkheads mentioned) or as to the manner of ingress or egress of vehicular traffic. That practically all of the vessels of the Puget Sound Navigation Company were formerly passenger vessels and were converted to ferry vessels which in some cases necessitated the additional bulkhead to meet the requirements of

(Testimony of Captain A. M. Peabody.)
the ferry classification, but that these were the only requirements.

That the witness was familiar with the vessels of the defendant company rendering the services above described on Puget Sound and that there was nothing in the United States Steamboat Inspection Service regulations which would prevent the classification of said defendant's vessels as ferries if they were owned by an American owner and application was made to the United States Steamboat Inspection Service for classification as ferries. That said vessels could be classified as ferries without any doubt, providing they satisfied the bulkhead requirement.

That Exhibit 19 was a true and correct statement of the traffic carried by Puget Sound Navigation Company on the run [70] indicated between Puget Sound ports and Victoria and Sidney, B. C., indicated in Exhibits 1, 2, 3 and 4. That the defendant and the Puget Sound Navigation Company have a cooperative arrangement whereby the tickets of each company can be used on the vessels of either company going to and from Puget Sound ports to the British Columbia ports named by whichever route the passenger prefers, but that there is no interlocking ownership at all between the two companies, that the businesses are highly competitive, and that the Puget Sound Navigation Company gets all the business it can at all times.

Whereupon the defendant rested and the plaintiff stated that it had no further testimony to offer. Thereupon the defendant made the following motion:

"MOTION FOR SPECIAL FINDINGS AND CONCLUSIONS OR, IN THE ALTERNATIVE, FOR JUDGMENT.

"Comes now the defendant and moves the court to find specially that the operations carried on by the defendant in connection with which overtime of immigration inspectors is sought to be collected constitutes the operation of international ferries exempted from lability for such overtime pursuant to the proviso of Title 8, U. S. C. A., Section 109B, and to find therefrom that the defendant is not liable for the overtime of immigration inspectors sought to be recovered in this action.

In the alternative, that the court grant judgment in favor of the defendant."

Whereupon the court denied the defendant's motion to enter special findings, and denied the defendant's motion in the alternative for judgment in its favor, to which rulings and each and every part thereof the defendant excepted and its exception was allowed.

Whereupon the court took the case under advisement until October 9, 1933, on which date the court entered its memorandum decision as follows, to-wit: [71]

In the United States District Court for the Western District of Washington, Northern Division.

No. 20730

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY,
a foreign corporation,
Defendant.

October, 1933.

DECISION.

The plaintiff has brought this action to recover compensation for overtime service performed by employees of the immigration service, as provided by Act approved March 2, 1931 (8 USCA 109a, b, and Department of Labor General Order 175, issued April 27, 1931.

The court finds the following facts:

The defendant is a foreign corporation operating a li*en* of steamships on the waters of Puget Sound, the Gulf of Georgia, Straits of De Fuca, and the Pacific Ocean, and operates a triangular service between Seattle, Victoria and Vancouver, B. C., over waters classified by the United States Department of Commerce by the Pilot Rules for Inland Waters as a portion of the high seas. (Page 14), two steamers going in opposite directions: Victoria, Seattle and Vancouver; and Victoria, Vancouver and Seattle, on regular daily schedule. Day service: Leave Vancouver 10:30 A.M., arrive Victoria 3

P.M., leaving Victoria 3:45 P.M., arrive Seattle 8:30 P.M.; Leave Seattle 9 A.M., arrive Victoria 2 P.M., arrive Vancouver 6:30 P.M. [72] Night service: Leave Seattle 11:30 P. M., arrive Vancouver 8 A.M.; leave Vancouver 1 P.M., arrive Seattle 7:30 A.M. The service between Victoria and Seattle was inaugurated in 1903, and the triangular service in 1908.

It is testified that the vessels used were designed and constructed for this particular service to "carry a large number of passengers and accommodate the automobiles and passengers that traveled with them, and some mail and minor shipments of cargo in the way of small shipments of perishables; but, in the main, they are passenger steamers and carry a large number of passengers, and of recent years the growth of automobile traffic necessitated further development of that type, and the Princess Marguerite and the Princess Kathleen are the outgrowth of this development."

Defendant has no license or franchise to operate a ferry line with these vessels. The defendant is operating regular ferry lines between Nanaimo and Vancouver; Sidney and Anacortes; Victoria and Port Angeles, but on these ferry routes the conventional open-end type of ferry boats are used.

The vessels, for the examination of the passengers and crews of which overtime pay is sought, are: Princess Kathleen, tonnage 2875.12, passengers 1280; berths 290; Princess Charlotte, tonnage 3924.74, passengers 600, berths 230; Princess Louise, tonnage 4031.92, passengers 400, berths 262; Prin-

cess Adelaide, tonnage 3061, passengers 400, berths 206; Princess Marguerite, tonnage, passengers and berths not given. Each vessel, also, has a spacious dining room. In the advertising matter of the defendant, these vessels are referred to as "Princess Liners", and are classified by the United States Steamboat Inspection Service as foreign passenger steamers. The distance from Victoria to Vancouver is approximately 85 miles; from Victoria to Seattle, 81 miles; from Vancouver to Seattle, 145 miles. Vancouver is approx- [73] imately 25 miles north of the International Boundary, and Seattle is approximately 120 miles south of it. The route from Seattle to Vancouver crosses the waters of Puget Sound, Straits of Georgia and a part of the high sea, and is in a general parallel course to the coast line and shore line of the Great Northern Railway running from Seattle to Vancouver. The Puget Sound Navigation Company operates an international passengers, etc., ferry service, but its vessels are all built upon the conventional ferryboat lines, with open end for embarking and de*p*arking automobiles and passengers.

During the period from March 1, 1932, to February 28, 1933, the defendant carried from Vancouver and Victoria to Seattle, 45,387 passengers; from Seattle to Vancouver and Victoria, 48,116; 1498 automobiles from Vancouver and Victoria to Seattle, and 1133 automobiles from Seattle to Vancouver and Victoria. Automobiles are embarked and debarked from the defendant's vessels at side port or gangway. Some of the older vessels had to have

the gangway opened wider to accommodate the automobiles.

Overtime charges amount to $4248.80.

From the foregoing facts the conclusion must follow:

That the defendant's boats in issue are not international ferries within the exception of section 109b, Title 8 USCA:

> "Provided, that this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules (March 2, 1931, c. 368, sec. 2, 46 Stat. 1467).

ANTHONY SAVAGE, U. S. Attorney,
HAMLET P. DODD, Asst. U. S. Atty.,
For Plaintiff;

BOGLE, BOGLE & GATES,
For Defendant. [74]

NETERER, District Judge:

A ferry line is a creation of local franchise after finding of necessity, after notice and formal hearing by local authority, and may be intrastate, interstate, and by the same token, international. Vol. 6, Title 32, secs. 5462-5486, Rem. Comp. Stat. of Washington. The type of the vessels and the service rendered, aside from the local license or franchise, ob-

viously determine the character of the service. The vessels are of the ocean liner type, with a deck arrangement for automobiles with other cargo, all embarking and debarking at the side port or gangway. The spacious dining room service and berths and sleeping apartments indicates comfort and service, other than ferry service. A ferry is a service of necessity, for the common good, to reach a point across a stream, lagoon or lake, or bay. The service of the vessels in issue predominates in no such service, but rather offers a privilege to view the scenic beauties afforded by the many islands of the San Juan Archipelago of Puget Sound, pronounced by tourists to equal the beauties of the Thousand Islands of the Gulf of St. Lawrence, and is said the picturesque sunset is not surpassed by the sunset of the Bay of Naples, and give, instead of a ferry service, a delightful scenic service and service competitive—not necessary—with the almost parallel line of the railway and the Pacific Highway, a public thoroughfare between Seattle and Vancouver, B. C., for a distance of approximately 145 miles. Nor does the service furnish a connecting link for highway traffic. (Of course, highways emanate from each city terminus of the steamship line where the ships berth at the ocean docks.) A ferry may be said to be a necessary service by specially constructed boat to carry passengers and property across rivers or bodies of water from a place on one shore to a point conveniently opposite on the other shore and in continuation of a highway making connections [75] with a thoroughfare at each terminus.

Anciently, a ferry performed the same service of carry people and cargo across a river small lagoon or narrow lake on the watercraft as was later, and is, carried by a bridge structure above the water. This service was extended to larger lakes and other larger bodies of water in extension of, or forming a connecting link to highways.

The distance from Seattle to Vancouver over the defendant's route and the distance between the same points over the line of railway and public highway are approximately the same. The court judicially knows that the Pacific Highway is a construction according to the modern scientific conception of hard surface highway, with the distance approximately the same as the railway or the steamboat route.

Defendant has no license or franchise to operate a ferry within the boundaries of the state of Washington. The police power of the state, no doubt, extends to regulation of a ferry operating in and into the state, if interstate or foreign commerce is not directly burdened. St. Claire Co. v. I. S. & C. T. Co., 192 US 454. Nor has the Congress the power to interfere with police regulation relating exclusively to internal affairs. Regulation of operation of international ferries within the state is feasible without violation of international custom or law. United States v. DeWitt, 76 US 41 (9 Wall.). Nor is the United States concerned with conditions in which internal trade may be carried on. The Trademark Cases, 100 U.S. 82. Nor to the reasonable regulation of wharves, piers, docks, boat lands, etc. Cannon v. New Orleans, 87 U.S. 577 (20 Wall.)

Nor establishment of ferries. Conway v. Taylor's Executors, 1 Black 603.

It is obvious from the conventional seagoing construction of the vessels, the character of the service rendered and absence of compliance or attempt to comply with local ferry laws, the defendant was not and is not operating the vessels in issue as an [76] international ferry, and therefore within the exception 109b, Title 8, USCA; and judgment must follow for the plaintiff.

.....

United States District Judge. [77]

and the court ordered that said memorandum decision be entered as its findings of fact and conclusions of law, and the defendant took exception to said memorandum decision and each and every part thereof and to said order adopting the court's decision as its findings of fact and conclusions of law, and each and every part thereof, which exceptions were duly allowed. Thereupon the court entered its order and judgment for the plaintiff, to which order and each and every part thereof, the defendant excepted and its exceptions were allowed. Each of said exceptions of the defendant were based upon the grounds set forth by said defendant in its memorandum of authorities in support of its motion for judgment in its favor, to-wit, upon the ground that the defendant was entitled to have judgment entered in its favor dismissing the plain-

tiff's action as a matter of law and on the ground that the statutes authorizing the Bureau of Immigration, Department of Labor, to collect overtime pay from certain carriers for the examination of passengers arriving at ports of entry of the United States after 5:00 P. M. and before 8:00 A. M. does not apply to the defendant or to the examination of passengers arriving by its vessels described in this suit, and on the ground that the proviso of the act authorizing payment of overtime to Immigration Inspectors specifically exempts from such charges the defendant's vessels operating as international ferries, and on the ground that the vessels of the defendant described in this suit are international ferries within the meaning of the aforesaid proviso, and on the ground and for the reason that the rulings of the court disregarded the intent and purpose of the aforesaid act and the intent and purpose of the proviso thereof exempting regular scheduled traffic between the United States and Canada, and on the ground that the court's rulings and the aforesaid con- [78] struction of said statute effect an unjust discrimination against the defendant which would render the aforesaid statute unconstitutional.

At the trial of said cause plaintiff's Exhibits "A" to "F" inclusive and defendant's Exhibits 1 to 20 inclusive were admitted in evidence, said Exhibits being attached hereto.

And at the trial of said cause such proceedings were had and such evidence was offered and such motions and such rulings by the court were made,

and such exceptions were taken and saved at the respective times of the several rulings and actions excepted to as herein indicated in the foregoing pages. Inasmuch as the matters and things above set forth do not fully appear of record, the said defendant, the Canadian Pacific Railway Company, tenders and presents the foregoing as its Bill of Exceptions in said cause and prays that the same may be settled, allowed, signed and sealed and made a part of the record in said cause by this Honorable Court pursuant to law in such cases.

Which is accordingly done and ordered by the court on this 20th day of December, 1933, in term.

JEREMIAH NETERER,
District Judge.

Now in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in the above entitled cause and prays that the same may be settled, allowed, signed and certified as provided by law.

BOGLE, BOGLE AND GATES,
Attorneys for Defendant.

The foregoing bill of exceptions is approved as to form: ~~Offered~~ Approved for Entry.

ANTHONY SAVAGE
By HAMLET P. DODD

[Endorsed]: Filed Dec. 20, 1933. [79]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Jeremiah Neterer, District Judge:

The above named defendant feeling aggrieved by the judgment entered against it herein in the above entitled cause on the 6th day of November, 1933, does hereby appeal from said judgment and each and every part thereof, and from each and every adverse ruling made in the above entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed, and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

CANADIAN PACIFIC RAILWAY COMPANY,
a corporation, defendant and appellant.
By Bogle, Bogle & Gates,
Its Attorneys [80]

Appeal allowed, to operate as a supersedeas, upon the petitioner filing a bond in the sum of

$7500.00, with sufficient surety, to be conditioned as required by law.

JEREMIAH NETERER,
District Judge.

Copy received Dec. 20, 1933.

HAMLET P. DODD,
Asst. U.S. Atty.

[Endorsed]: Filed Dec. 20, 1933. [81]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the defendant in the above entitled cause and files its assignments of error upon which it relies upon the prosecution of the appeal in the above entitled cause from the judgment entered herein by this Honorable Court on the 6th day of November, 1933:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in entering judgment for the plaintiff against the defendant for wages claimed by the plaintiff to be due and payable to United States Immigration Inspectors on account of overtime immigration inspection service rendered to passengers on the defendant's vessels arriving at Seattle, Washington, daily on regular schedules, after 5:00 P. M. and before 8:00 A. M.

2. That the said court erred in holding that defendant's vessels operating on regular schedules

between Vancouver, B. C. and Seattle, and Victoria, B. C. and Seattle, were subject to the overtime immigration inspection service charges as provided in the Act of March 2, 1931 (8 U. S. C. A. 109a, b) and in failing to hold that said vessels were exempt from the said overtime immigration inspection service charged by reason of the following proviso of the above quoted act: [82]

> "Provided that this action shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges or tunnels, or by aircraft, railroad trails, or vessels on the Great Lakes or connecting waterways, and operating on regular schedules."

3. That the said court erred in failing to find that Congress intended, in adopting the foregoing proviso of the Overtime Act, to exempt from the payment of overtime charges all vessels rendering international ferry service on regular schedules across the border line between Canada and the United States, and in failing to find that the defendant's vessels between Victoria and Seattle and Vancouver and Seattle were rendering such services, and in failing to enter the defendant's proposed findings of fact and conclusions of law.

4. That the said court erred in holding that the said vessels of the defendant were not "international ferries" within the meaning of the foregoing proviso because the defendant had no franchise to operate international ferries and because the defendant's vessels had "side ports" for the ingress

and egress of vehicular traffic instead of entrances at the bow and stern of said vessels, as is usual in the "conventional ferry boats"; and in holding that the design and construction of said vessels determine whether or not they are "international ferries" within the meaning of the proviso, and in failing to hold that the character of the service rendered and not the design of the vessels determines their status under the act and their right to exemption from overtime charges.

5. That said court erred in failing to hold that the construction placed upon the aforesaid act by the Bureau of Immigration, Department of Labor, in holding that defendant's vessels operating between Victoria and Seattle and Vancouver and Seattle were [83] *were* not "international ferries" entitled to exemption from overtime immigration inspection service charges, constituted an arbitrary and unlawful construction of said act which renders the same unconstitutional, in that said construction of the act constitutes an unlawful and arbitrary discrimination against this defendant and in favor of common carriers of passengers competing with the defendant and rendering the same or similar services between Canada and the United States.

6. That the said court erred in failing to enter judgment of dismissal.

7. That the said court erred in denying defendant's and appellant's motion to judgment in its favor.

WHEREFORE, the defendant and appellant prays that the said judgment of the said District

Court may be reversed, and that the said court be ordered to enter judgment of dismissal, and for such other and further relief as to the court may seems just and proper.

BOGLE, BOGLE & GATES,
Attorneys for Defendant and Appellant.

Copy received 12/20/33.

HAMLET P. DODD.

[Endorsed]: Filed Dec. 20, 1933. [84]

[Title of Court and Cause.]

NOTICE OF APPEAL.

TO: ANTHONY SAVAGE, UNITED STATES ATTORNEY, AND TO HAMLET P. DODD, ASSISTANT UNITED STATES ATTORNEY:

NOTICE IS HEREBY GIVEN that the defendant and appellant Canadian Pacific Railway Company hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of dismissal entered herein on the 6th day of November, 1933, and from each and every part thereof, and from each and every adverse ruling in the above entitled cause.

CANADIAN PACIFIC RAILWAY COMPANY
By BOGLE, BOGLE & GATES,
Its Attorneys.

Copy Received Dec. 20th, 1933.

HAMLET P. DODD.

[Endorsed]: Filed Dec. 20, 1933. [85]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, CANADIAN PACIFIC RAILWAY COMPANY, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, licensed to do business in the State of Washington, as principal, and PACIFIC INDEMNITY COMPANY, a corporation, duly incorporated under the laws of the State of California and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the United States of America, plaintiff in the above entitled cause, in the full sum of Seven Thousand five hundred dollars ($7500.00) lawful money of the United States to be paid to it, to which payment well and truly to be made we bind ourselves jointly and severally, and our successors and assigns, by these presents.

Sealed with our seals and dated this 20th day of December, 1933.

WHEREAS, the above named principal has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the United States District Court for the Western District of Washington, Northern Division, made and entered on the 6th day of November, 1933. [86]

NOW, THEREFORE, the condition of this obligation is such that if the above named principal shall prosecute its said appeal to effect, and if it fail

to make its plea good shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and effect.

CANADIAN PACIFIC RAILWAY COMPANY, a corporation,
By BOGLE, BOGLE & GATES,
PRINCIPAL.

PACIFIC INDEMNITY COMPANY,
[Seal] a corporation,
By CASSIUS E. GATES,
Attorney in Fact
SURETY.

The foregoing bond and the sufficiency of the surety thereon are approved as a supersedeas bond on appeal.

Dated this 20th day of December, 1933.

JEREMIAH NETERER,
District Judge.

Received copy of the foregoing bond this 20th day of December, 1933.

ANTHONY SAVAGE,
United States District Attorney.

[Endorsed]: Filed Dec. 20, 1933. [87]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto, acting through their respective counsel, as follows:

WHEREAS the defendant is appealing from the decision of the District Court for the Western District of Washington, Northern Division, and judgment entered in favor of the plaintiff in the above entitled cause, and it is the desire of both parties to stipulate for the omission of certain matter from the transcript of record and for the printing of certain exhibits as a part of the transcript of record on appeal;

NOW, THEREFORE the parties stipulate as follows:

1. In respect to plaintiff's Exhibit C and C-1, it is stipulated that that portion of the said exhibits which refers to ports of entry along the Mexican borderline of the United States has no material bearing upon this cause of action in any way and may be omitted from the transcript of record, to-wit, that portion of said statement in Exhibit C which relates to immigration districts Nos. 10, 22, 25, and 31, beginning on page 13 of said statement and concluding on page 16 thereof.

That plaintiff's Exhibits C and C-1 by error and inadvertence failed to give the number of applicants for admission to the United [88] States at the port of Seattle during the fiscal year ending June 30, 1932, and that such statement be and the same hereby is deemed to be amended to include and show the following applicants for admission at the port of Seattle, and to show the steamship line landing said passengers at Seattle, for the fiscal year ending June 30, 1932:

Passengers arriving by Canadian Pacific Railway (defendant's) vessels	71,540
Passengers arriving by Puget Sound Navigation Company vessels	7,119
Passengers arriving by Pacific Steamship Company, Grace Line and other vessels	147
Total	78,806

2. That the following exhibits shall be printed as a part of the transcript of record and that all other exhibits shall not be printed but shall be referred to the Circuit Court of Appeals:

Plaintiff's Exhibit D and that much of Exhibit F which shows the name, size and capacity of defendant's vessels;

Defendant's Exhibits 7, 13 and 18.

ANTHONY SAVAGE
HAMLET P. DODD
Attorneys for Plaintiff.
BOGLE, BOGLE & GATES,
By Norman M. Littell
Attorneys for Defendant.

[Endorsed]: Filed Dec. 20, 1933. [89]

[Title of Court and Cause.]

ORDER REGARDING PRINTING AND TRANSMITTING EXHIBITS.

IT IS ORDERED, ADJUDGED AND DECREED that the following exhibits in this cause shall be printed and that all other exhibits be trans-

mitted to the Circuit Court of Appeals with the transcript of record on appeal:

Plaintiff's Exhibit D and that much of Exhibit F which shows the name, size and capacity of defendant's vessels:

Defendant's Exhibits 7, 13 and 18.

Done in open court this 20th day of December, 1933.

JEREMIAH NETERER,
District Judge.

Copy received and approved Dec. 20, 1933.
HAMLET P. DODD.

[Endorsed]: Filed Dec. 20, 1933. [90]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above entitled Court:

You will please prepare the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, to consist of all necessary papers, including the following:

1. Complaint;
2. Answer to complaint; and reply.
3. Stipulation waiving jury;
4. Judgment of dismissal;
5. Order extending time for filing bill of exceptions, and extending term of court;
6. Bill of exceptions;

7. Petition of appeal and order allowing appeal;
8. Assignments of error;
9. Citation on appeal;
10. Notice of appeal;
11. Stipulation regarding contents of transcript of record;
12. Order transmitting exhibits;
13. Supersedeas bond on appeal and order of approval; [91]
14. This praecipe;
15. Clerk's certificate.

You are requested, except upon this praecipe, to omit all captions except names of papers, to omit all acceptances of services except instruments Nos. 6, 9, 10 and 15, to omit verifications on instruments Nos. 1 and 2, and to omit filing endorsements except the date thereof.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

Received copy of the above praecipe this 20th day of December, 1933.

HAMLET P. DODD,
United States District Attorney.

[Endorsed]: Filed Dec. 20, 1933. [92]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the above entitled Court do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 92, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [93]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 232 folios at 15¢ per folio,	$ 34.80
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original exhibits	.50
Total	$ 40.80

I further certify that the above cost for preparing and certifying record, amounting to $40.80, has been paid to me by the attorneys for the appellant.

I further certify that I transmit herewith the original citation issued in the above entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the said District Court, at Seattle, in said District, this 3d day of January, 1934.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court,
Western District of Washington,
By T. W. Egger, Deputy Clerk. [94]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
County of King.—ss.

To: THE UNITED STATES OF AMERICA, plaintiff and appellee, and to ANTHONY SAVAGE, United States District Attorney, its attorney:

GREETING:

YOU AND EACH OF YOU are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to an order allowing an appeal

filed and entered in the Clerk's office in the District Court of the United States for the Western District of Washington, Northern Division, from a judgment against the defendant, signed, filed and entered on the 6th day of November, 1933, in that certain suit being at law No. 20730, wherein the Canadian Pacific Railway Company is defendant and appellant, and you are plaintiff and appellee, to show cause, if any there be, why the judgment rendered against the said defendant and appellant should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable Jeremiah Neterer, United States [95] District Judge for the Western District of Washington, Northern Division, this 20 day of December, 1933.

[Seal] JEREMIAH NETERER

Copy received this 20 day of December, 1933.

ANTHONY SAVAGE
United States District Attorney.

[Endorsed]: Filed Dec. 20, 1933. [96]

[Endorsed]: No. 7366. United States Circuit Court of Appeals for the Ninth Circuit. Canadian Pacific Railway Company, a foreign corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed January 5, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7366

CANADIAN PACIFIC RAILWAY COMPANY, a foreign corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto, acting through their respective undersigned counsel, that the following exhibits shall not be printed in the transcript of record on appeal, but may be inspected by the court in their original form:

Plaintiff's Exhibit "D" (photographs of vessels)
Defendant's Exhibit 7 (map of the United States border showing ports of entry)
Defendant's Exhibit 13 (pictures of the defendant's vessels)
Defendant's Exhibit 18 (pictures of the Puget Sound Navigation Company ferries).
Plaintiff's Exhibit "F" (Steamship schedules)

BOGLE, BOGLE & GATES,
Attorneys for Appellant.
ANTHONY SAVAGE,
United States Attorney.
By HAMLET P. DODD,
Assistant United States Attorney
Attorneys for Appellee.

[Endorsed]: Filed Jan. 16, 1934. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7366

CANADIAN PACIFIC RAILWAY COMPANY, a foreign corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER.

It appearing to the court upon stipulation of the parties hereto that the exhibits enumerated below

need not be printed in the transcript of record, and it appearing to the court that the cost of printing said exhibits would be a considerable sum burdensome of the party paying the costs herein; now, therefore, it is

ORDERED that Plaintiff's Exhibit "D" and "F", Defendant's Exhibit 7, Defendant's Exhibit 13, and Defendant's Exhibit 18 be not printed in the transcript of record, and that said exhibits may be examined by the court in their original form.

Dated this 16th day of January, 1934.

CURTIS D. WILBUR,
Senior U. S. Circuit Judge.

Approved for entry:

BOGLE, BOGLE & GATES,
Attorneys for Appellant.

ANTHONY SAVAGE,
United States Attorney
By HAMLET P. DODD,
Assistant United States Attorney
Attorneys for Appellee.

[Endorsed]: Filed Jan. 16, 1934. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

7

CANADIAN PACIFIC RAILWAY COMPANY, a foreign Corporation,
Appellant,

—vs.—

UNITED STATES OF AMERICA,
Appellee.

No. 7366

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

BOGLE, BOGLE & GATES,
NORMAN M. LITTELL,
EDWARD G. DOBRIN,
Attorneys for Appellant.

609-24 Central Building,
Seattle, Washington.

Farwest Lithograph & Printing Co.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY, a foreign Corporation,
Appellant,

—vs.—

UNITED STATES OF AMERICA,
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} No. 7366

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

BOGLE, BOGLE & GATES,
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EDWARD G. DOBRIN,
Attorneys for Appellant.

609-24 Central Building,
Seattle, Washington.

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UNITED STATES CIRCUIT COURT OF APPEALS

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Appellee.

No. 7366

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

STATEMENT OF THE CASE

I. Proceedings below.

This action was brought to collect compensation alleged to be payable pursuant to Sec. 109 a, b, Title 8, U. S. C. (Appendix A), for overtime immigration inspection service rendered from May 1, 1931 to September 30, 1932, to passengers arriving in the United States on appellant's daily vessels from Victoria and Vancouver,

B. C. The appellant denied liability on the grounds that it was exempt from the payment of overtime charges by reason of the following proviso of the above act:

> " * * * Provided, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules. (Mar. 2, 1931, c. 368, §2, 46 Stat. 1467)."

The District Court entered judgment for the plaintiff (R. 61), from which this appeal is prosecuted. The Findings of Fact and Conclusions of Law (R. 95, 101), hold that the appellant's vessels are not "international ferries."

II. The Facts.

The appellant company, from 1903 until the present date, has operated vessels daily between Victoria, Vancouver Island, B. C., and Seattle, Washington, and since 1908 from Vancouver, B. C., to Seattle, Washington, on regular schedules, the vessels from Victoria arriving at Seattle at 9:00 P. M. and the ones from Vancouver arriving at 7:45 A. M. (disregarding slight and immaterial changes in arrival time). The vessels carried vehicles and passengers, the vehicular traffic being driven aboard ship in the same manner as such traffic is handled on all ferry vessels, except that the entrance to the appellant's vessels is through side ports and not through openings in the bow and stern of said vessels. (Exh. 13, 14) (R. 82).

The operations of the appellant's vessels are part of a network of communications between Vancouver Island

and the mainland on the American side of the borderline, the remaining services being maintained by the Puget Sound Navigation Company, a Washington corporation, operating ferries between the mainland and San Juan Island points, between Port Angeles, Washington, and Victoria, B. C., and between Anacortes and Bellingham, Washington, and Sidney, B. C. (R. 78, 79, Exh. 18, R. 84, pictures of Puget Sound Navigation Company's ferries; Exh. 2, 3, 4, R. 77, 78, ferry schedules, and Exh. 8, R. 80, chart of the Puget Sound region showing routes of services referred to). The District Court found these vessels to be ferries because "on these ferry routes the conventional open-end type of ferry boats are used" (R. 96, 97).

Passenger tickets issued by the appellant and by the Puget Sound Navigation Company are interchangeable, so that passengers may reach Vancouver Island or the City of Vancouver, B. C., by any one of a number of routes. They can drive their cars aboard the appellant's vessels at Seattle and proceed directly to Victoria or to Vancouver or they can drive to Anacortes or Bellingham or Port Angeles on the American side of the border, and there go aboard the Puget Sound Navigation Company's ferries and proceed to Victoria or Sidney, B. C., located a few miles north of Victoria on Vancouver Island. There is no interlocking ownership, management, or identity of interests between the two companies, the above arrangement being purely cooperative. The companies are in all respects competitive.

There are regular currents of traffic in each direction

to and from Seattle, the flow being about equal in each direction. Thus, during the year from March 1, 1932, to February 28, 1933, the appellant carried 45,387 passengers and 1,498 automobiles from Vancouver and Victoria to Seattle, and 48,116 passengers and 1,132 automobiles from Seattle to Vancouver and Victoria (R. 82, 83, Exh. 15).

All inbound traffic arriving at ports of entry on Puget Sound is examined by United States Immigration Inspectors before passengers are admitted into this country. This examination has been made without charge to the carriers until the passage of the act of March 2, 1931, Sec. 109 a, b, Title 8, U. S. C., providing that carriers landing passengers in ports of entry of the United States after 5:00 P. M. and before 8:00 A. M. should pay to the Government the amount of compensation specified in the act for overtime immigration inspection service. This compensation is then paid to the inspectors who render the services. As is hereinafter shown, the act was designed to meet the rising demand for overtime immigration inspection service for trans-Atlantic carriers arriving at ports of entry at unanticipated hours, and the above quoted proviso was added to the act to exempt from its provisions the carriers named WHEN OPERATING ON REGULAR SCHEDULES over the Canadian border.

The testimony offered by the Government (R. 69, 75, Exh. C, R. 67, Exh. C-1, R. 67), shows that over 20,000,000 people were examined and admitted at ports of entry across the entire Canadian borderline during the fiscal year ending June 30, 1932, at 110 ports of entry, and that *all carriers across the border* (railroad trains, bridges,

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY, a foreign Corporation,
Appellant,

—vs.—

UNITED STATES OF AMERICA,
Appellee.

No. 7366

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

SPECIFICATIONS OF ERRORS

The errors assigned (R. pages 105-107) and which are relied upon on this appeal, charge that the judgment appealed from is erroneous in that:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in entering judgment for the plaintiff against the defendant for wages claimed by the plaintiff to be due and payable to United States Immigration Inspectors on account of overtime immigration inspection service rendered to passengers on the defendant's vessels arriving at Seattle, Washington, daily on regular schedules, after 5:00 P. M. and before 8:00 A. M.

2. That the said court erred in holding that defendant's vessels operating on regular schedules between Vancouver, B. C., and Seattle, and Victoria, B. C., and Seattle, were subject to the overtime immigration inspection service charges as provided in the Act of March 2, 1931 (8 U. S. C. A. 109 a, b), and in failing to hold that said vessels were exempt from the said overtime immigration inspection service charged by reason of the following proviso of the above quoted act:

> "Provided that this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes or connecting waterways, and operating on regular schedules."

3. That the said court erred in failing to find that Congress intended, in adopting the foregoing proviso of the Overtime Act, to exempt from the payment of overtime charges all vessels rendering international ferry service on regular schedules across the border line between Canada and the United States, and in failing to find that the defendant's vessels between Victoria and Seattle and Vancouver and Seattle were rendering such services, and in failing to enter the defendant's proposed findings of fact and conclusions of law.

4. That the said court erred in holding that the said vessels of the defendant were not "international ferries" within the meaning of the foregoing proviso because the defendant had no franchise to operate international ferries and because the defendant's vessels had "side ports" for the ingress and egress of vehicular traffic

instead of entrances at the bow and stern of said vessels, as is usual in the "conventional ferry boats"; and in holding that the design and construction of said vessels determine whether or not they are "international ferries" within the meaning of the proviso, and in failing to hold that the character of the service rendered and not the design of the vessels determines their status under the act and their right to exemption from overtime charges.

5. That said court erred in failing to hold that the construction placed upon the aforesaid act by the Bureau of Immigration, Department of Labor, in holding that defendant's vessels operating between Victoria and Seattle and Vancouver and Seattle were not "international ferries" entitled to exemption from overtime immigration inspection service charges, constituted an arbitrary and unlawful construction of said act which renders the same unconstitutional, in that said construction of the act constitutes an unlawful and arbitrary discrimination against this defendant and in favor of common carriers of passengers competing with the defendant and rendering the same or similar services between Canada and the United States.

6. That the said court erred in failing to enter judgment of dismissal.

7. That the said court erred in denying defendant's and appellant's motion to judgment in its favor.

tunnels, auto stages, ferries and vessels on the Great Lakes and connecting waterways) *were exempt from the payment of overtime compensation* for arrivals after 5:00 P. M. and before 8:00 A. M. when operating on regular schedules, *except the vessels of the Puget Sound Navigation Company and those of the appellant.* These vessels (Exh. 13, R. 82, Exh. 18, R. 84), are charged with overtime compensation on the ground that they are not "international ferries."

III. The Issue.

The foregoing facts and proceedings below give rise to one issue:

> IS THE APPELLANT STEAMSHIP COMPANY EXEMPT FROM THE PAYMENT OF COMPENSATION FOR OVERTIME IMMIGRATION INSPECTION SERVICE RENDERED TO PASSENGERS ARRIVING AT SEATTLE ON ITS VESSELS FROM VICTORIA AND VANCOUVER, B. C., AT 9:00 P. M. AND 7:45 A. M. RESPECTIVELY EACH DAY UNDER THE PROVISO OF SECTION 109 B, TITLE 8, U. S. C.?

ARGUMENT

I. CONSTRUCTION OF THE ACT

1. Authorities and rules of construction; error of the District Court.

Before determining the meaning and purpose of the proviso above quoted, it should be noted that the decision of the District Court is squarely opposed to a decision of the Supreme Court not cited by the lower court. Judgment against the appellant was based primarily upon the grounds that a ferry line is "a creation of local

franchise after finding of necessity" and that the "defendant has no license or franchise to operate a ferry within the boundaries of the State of Washington."

The Supreme Court in *Sault Ste. Marie v. International Transit Co.* (1914), 234 U. S. 333, 58 L. ed. 1337, held to the contrary that a state has no power to issue a franchise for international ferries. An ordinance of the City of Sault Ste. Marie required that anyone operating a ferry should secure a license. The operator of one of the International Transit Company's ferry boats operating between Michigan and Canada was arrested for failure to secure a license. The Supreme Court, speaking through Mr. Justice Hughes, said, at page 340:

> "The ordinance requires a municipal license; and the fundamental question is whether, in the circumstances shown, the state, or the city, acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the state, or the city, may make its consent necessary, it may withhold it. * * * Has the state of Michigan the right to make this commercial intercourse a matter of local privilege, to demand that it shall not be carried on without its permission, and to exact as the price of its consent—if it chooses to give it—the payment of a license fee? This question must be answered in the negative."

And at page 341:

> "The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce."

See also:

Port Richmond Ferry Co. v. Freeholders of H. County (1914), 234 U. S. 317, 58 L. ed. 1330.

The foregoing decisions render erroneous the principal finding of the District Court upon which judgment was predicated. The secondary grounds for the court's decision was the size and construction of the appellant's vessels which the court held precluded them from being ferries (R. 99).

Before showing that the District Court was equally in error in its secondary reasons for judgment against the appellant, it should be noted that the phrase "international ferry" is new in the law, and is not defined in the act nor in any decision which either counsel could discover. The word "ferry" itself has been subject to a wide variety of definitions, the narrowest of which, adopted by the District Court, defeats the evident purpose of the act.

What then did Congress mean in the above quoted proviso by referring to "international ferries?"

Rules of statutory construction were clearly laid down in the case of *Church of the Holy Trinity v. United States* (1891), 143 U. S. 457. There the question was whether an act "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States" applied to a contract between a rector or minister and an incorporated American religious society, whereby the former was to be engaged as the minister of the latter society. The act excluded any foreigners who were "to perform labor or services of

any kind in the United States" under contract. The court said, at page 459:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."
>
> * * *

And at page 463:

> "*Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.*"
>
> * * *

And again at page 464:

> "It appears, also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. *So far, then, as the evil which was sought to be*

remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

"A singular circumstance, throwing light upon the intent of Congress, is found in this extract from the report of the Senate Committee * * * ."

The rules laid down in the above decision have been repeatedly applied to accomplish the aims of the legislature. Thus, in *Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission* (1912), 230 U. S. 323, 57 L. ed. 1501, the question was whether or not the word "railroad" applied to a street railway chartered as such under the laws of Iowa and operating lines across the Missouri River from Council Bluffs to Omaha. The Interstate Commerce Commission ordered a reduction in rates. The company sought to enjoin enforcement of the order. The court pointed out the conflict of authorities as to the meaning of the word "railroad," some having applied the term solely to steam railroads and others to street railroads, and said, at page 334:

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute."

The court pointed out that the various provisions of the Interstate Commerce Act applied peculiarly to railroads hauling passengers between states and not to street railways, and then held that, "street railroads not

being guilty of the mischief sought to be corrected" and "the remedial provisions of the statute not being applicable to them," they were not intended to be within the meaning of the word "railroad."

On the contrary, the word "railroad" was held to include street railways within the intent and purpose of a provision of the Bankruptcy Act, barring certain enterprises from its benefits in the case of *In re Columbia Railway, Gas & Electric Company* (1928), 24 F. (2d) 828. The court said, at page 831:

> "If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroads. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. *Omaha St. Ry. Co. v. Interstate Commerce Comm.*, 230 U. S. 324, 335, 33 S. Ct. 890, 57 L. ed. 1501.
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> * * *
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> " * * * It is obvious that, if railroads were allowed to become bankrupts, many and serious difficulties would arise as to their right to be freed from their obligations as public servants, and large communities that depended upon them would be put to great inconvenience, if not to absolute disaster. Every consideration which applies to railroads generally in this respect applies also to street railways. The consequences would be different in degree and intensity merely, not in quality or kind. * * * ."

In the case of *W. O. Johnson v. Southern Pacific Company* (1904), 196 U. S. 1, 49 L. ed. 363, an act requiring automatic couplers to be provided for all cars and making it unlawful for any carrier to haul on its line "any car" not equipped with such couplers was construed. The

question was whether a locomotive was in fact a "car" within the meaning of the last quoted phrase. The Supreme Court said in quoting Mr. Justice Story, at page 18:

> "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that *the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.*"* * *
>
> "The risk in coupling and uncoupling was the evil sought to be remedied, * * * ."
>
> "That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer."

The rules of construction as contended for above were reviewed in the recent decision of *Sorrels v. United States of America* (1932), 287 U. S. 435, 77 L. ed. 413, in which the court said, at page 419, quoting from *U. S. v. Kirby*, 7 Wall 482:

> "*Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. * * * 'It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character.* The reason of the law in such case should prevail over its letter.' "

As stated in *Stevens v. Nave-M'Cord Mercantile Co.*, (C. C. A. 8, 1906), 150 Fed. 71, at page 75:

> " * * * Cardinal rules for the construction of a statute are that *the intention of the legislative body which enacted it should be ascertained and given effect, if possible, regardless of technical rules of construction and the dry words of the enactment; that that intention must be deduced not from a part but from the entire law; that the object which the enacting body sought to attain and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention;* that the statute must be given a rational, sensible construction; and that, if this be consonant with its terms, it must have an interpretation which will advance the remedy and repress the wrong."

There are two main sources of determining the intent of the legislature: (1) debates in Congress and (2) committee reports. There is no longer any question whatsoever but that the court may resort to the reports of committees to determine the evil aimed at and the intent of Congress in the passing of an act.

U. S. v. St. Paul M. & M. Ry. Co. (1917), 247 U. S. 310, 62 L. ed. 1130;

Omaechevarria v. Idaho (1918), 246 U. S. 343, 62 L. ed. 763 at page 769, note 12;

McLean v. United States (1912), 226 U. S. 374, 57 L. ed. 260;

Oceanic Steam Navigation Co. v. Stranahan (1909), 214 U. S. 320, 53 L. ed. 1013, at 1019;

Northern Pacific Railway Co. v. Washington (1911), 222 U. S. 370, 56 L. ed. 237;

Duplex Co. v. Deering (1921), 254 U. S. 443, 474, 475, 65 L. ed. 349.

As said in *Binns v. United States* (1904), 194 U. S. 486, 48 L. ed. 1087, at page 495:

> "We have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports."

In respect to debates in Congress it is now firmly established that debates may be resorted to where substantial unanimity of purpose is expressed. As stated in *Federal Trade Commission v. Raladam Co.* (1931), 283 U. S. 643, 75 L. ed. 1324, at page 650:

> "The fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the Act may be properly considered in determining what that purpose was and what were the evils sought to be remedied."

Examination of the debates in Congress on the bill here considered shows a clear unanimity of opinion and desire to exempt the regular scheduled traffic between Canada and the United States from the provisions of the overtime law. We refer to the committee reports and debates in Congress.

2. Intention of Congress; purpose of the Act and Proviso.

There are six specific exemptions from the overtime act by force of the proviso at issue in this case:

1. International ferries,
2. Bridges,
3. Tunnels,
4. Aircraft,
5. Railroad trains,
6. Vessels on the Great Lakes and connecting waterways;

when operating on regular schedules.

Before showing that the defendant's service is in fact an international ferry service and that the construction placed upon the act by the Immigration Service in effect repeals the first exemption named above, by refusing to recognize any service as international ferry service, we note the history and purpose of the act.

For many years the Customs Service has collected overtime charges from certain carriers (Sec. 267, Title 19, U. S. C.), but there is no proviso in the Customs Law such as that quoted above. An act almost identical with that of the Customs Overtime Act was introduced by Senator Reed of Pennsylvania, in the Senate on May 14, 1929 (S. R. 1126, Exh. 11, R. 81), and on May 24, 1929, an identical bill was introduced in the House (H. R. 3309, Exh. 11, R. 81), and both bills were referred to the Senate and House Committees on Immigration. In the House, the bill was reluctantly given a favorable report by the Committee, Representative Johnson of Washington, explaining, when the matter was first

opened for debate on June 9, 1930 (Congressional Record 10320), that:

> "Our Committee finally came to the conclusion that if it is paid in the Customs Service it should be applied to this service also. We do not like the system at all. The government is able to pay its inspectors in all services. But we cannot get rid of the privately paid overtime in the great, big Customs Service, so our Committee asks that you let the smaller Immigration Service 'hook on' to their system."

The matter was continued without further debate until June 16, 1930, when the bill again came up for discussion (Congressional Record 10907), and Representative Jenkins, who had introduced the bill, explained it as follows:

> MR. JENKINS: " * * * It is identical with the Customs law."
>
> MR. CRAMPTON: "Well, there is quite a question about the Customs situation, whether that is the way it ought to be or not."
>
> MR. JENKINS: "That is true, and because of that it is thought wise to insert an amendment in the bill restricting and controlling immigration across international bridges. I have such an amendment prepared, and if that is the only objection the gentleman has I will be glad to introduce the amendment, because I think it will clarify the whole situation."
>
> * * *
>
> MR. CRAMPTON: " * * * But what about international ferries? They run regularly; it is not an emergency but it is a regular thing."

A proviso was then read providing that the overtime act should not apply to international bridges, ferries, or

railroad trains operating on regular schedules, after which the following discussion took place, Mr. La Guardia referring to the proviso:

> MR. LA GUARDIA: "It would not apply to ocean steamers."
>
> MR. STAFFORD: "No. I wish this law to apply to ocean steamers, and I want to limit it to ocean traffic conditions."
>
> MR. CRAMPTON: " * * * If we have an amendment that the provisions of this act relating to extra compensation shall not apply to international bridges or ferries or railroad trains operating on regular schedules, it would seem to me that would reach the whole thing."
>
> MR. STAFFORD: "Not only the railroad train crossing the border is concerned *but any regular established service across the border*, and these men should not be privileged to exact two and one-half times their salary for just an hour's additional work. *It is only intended to apply to ocean service and that is the main consideration*" (Congressional Record 10908).
>
> " * * *
>
> MR. LA GUARDIA: "Mr. Speaker, *I want to ask the gentleman from Wisconsin if the purpose of the gentleman's amendment is to eliminate the extra time, particularly on the border, where the regular schedule is in operation?*
>
> MR. STAFFORD: "That is the purpose."
>
> MR. LA GUARDIA: "There is nothing in the amendment which in any way changes the purpose of the bill in its application to general steamship lines?"
>
> MR. STAFFORD: "No." (Congressional Record 10909).

That the bill was aimed at ocean-going vessels putting

into port at irregular hours and requiring the services of United States immigration inspectors after 5 P. M. and before 8 A. M. is clearly shown by the report of Mr. Gould from the Committee on Immigration in the House (Report No. 1720, Exh. 11, R. 81), in which the bill with amendment was finally reported to the House on February 21, 1931, with all of the exemptions first listed above incorporated therein. This report recites the facts in regard to increased overtime services as follows:

"The committee has found that overtime duty of immigration officers has increased steadily in recent years. The following figures show the steady, substantial increase in the work at the port of New York during the past five years:

	1925	1926	1927	1928	1929
Ships boarded	4,961	5,204	5,369	5,426	5,640
Passengers and seamen examined	894,338	1,016,954	1,119,466	1,198,261	1,208,123

"The first nine months of the current fiscal year show an increase at the same port over the corresponding period of last year in the number of persons inspected of 41,575. Naturally, with increased volume of arrivals have come increased demands for overtime services.

"The following summary for the month of March, 1930, at the port of New York, is both recent and informative on the subject of overtime:

"Arriving passenger steamers from foreign ports requiring assignment of immigration inspectors 278
"Number of same requiring overtime duty 41
"Number of inspectors performing overtime, each occasion 1 to 16
"Total number of overtime hours in which inspection occurred 130
"Grand total hours of overtime of all inspectors 833"

It is quite impossible to bring the appellant's service within the mischief aimed at by the overtime act. Appellant's vessels do not operate in transoceanic traffic; they do not arrive at unexpected hours; and they have caused no increase in the overtime services required for the past sixteen to twenty years. The two daily arrivals have remained as follows (except for minor and immaterial changes):

> Victoria boat, daily since 1903—9:00 P. M.
>
> Vancouver boat, daily since 1908—7:45 A. M. (until September, 1932, when arrival was changed to 8:00 A. M. to avoid overtime charge).

The evil aimed at in the act, as revealed by the above quoted committee reports and debates in the House and Senate, was the increasing number of overtime inspection hours rendered to passenger vessels from foreign ports—*a total of* 130 *hours of service in March*, 1930, *in New York, rendered to* 278 *vessels from foreign ports*. These were the ocean steamers referred to by Mr. Stafford arriving at unexpected hours, and not the "regular established service across the border" such as that of the defendant, which has been carried on unchanged for years *without increase in the amount of overtime and with the same vessels arriving at the same hour, each day.*

Of the numerous transportation services across the Canadian border described in appellee's testimony (Exh. C, C-1), there are many schedules which have more than two overtime arrivals per day, requiring much more than 130 hours of inspection service per day for many ports of entry, but this service is supplied as it is in any

private industry requiring night work, *by arranging the working day of certain inspectors to meet the regular scheduled traffic arriving after* 5:00 *P. M.* This is the spirit and intention of the proviso at issue, as manifest by the Immigration Department's own instructions (Exh. 12, p. 4, par. (n), R. 82):

> "Commissioners and district directors of immigration will arrange schedules and working hours of inspectors and employees of the Immigration Service so as to avoid overtime within this order, as far as possible consistent with the due enforcement of the Immigration Law and the convenience of persons arriving in the United States * * * ."

These instructions from the Department are perfectly in accord with the statements of Senator Reed, of Pennsylvania, explaining the act before the Committee on Immigration in the United States Senate (S. R. 1126, Exh. 11, p. 3, R. 81):

> " * * * Where you are inspecting ocean liners that come in on a schedule only they are exempt. But there are other vessels nobody can tell whether they will get in at 3 o'clock in the afternoon or at 11 o'clock in the evening. There the Government cannot be expected to keep on several shifts on a chance the steamer will come in that way, and we cannot reasonably expect the Government, and it is not economical, to keep the two shifts on. But where you have a situation as we have it at Detroit, Mich., with trains coming across the border all night long on regular schedules, that is one kind of situation.
>
> "In the first place, it is not reasonable to expect men to work overtime every day, and in the next place the Government knows the trains are coming in in the middle of the night, and it ought to run two shifts of men. It seems to me that is the situation

there, and it is not fair to force the railroad company to pay the overtime required for these regular scheduled trains, while it is fair to assess it upon steamships arriving irregularly, if they want to get rid of their passengers.

" * * *

"The steamships do not have to pay overtime, because if they do not want to they can keep the ship at quarantine and take it into dock the next day."

By ignoring the avowed and repeatedly expressed purpose of the proviso, recognized even in the Immigration Department's own regulations quoted above, and by standing upon a technical and narrow definition of the word "ferry," to be hereinafter discussed, the Department of Immigration has held that of all the regular scheduled traffic across the border between the United States and Canada, the vessels of the appellant (Exh. 13, 14, R. 82) and of the Puget Sound Navigation Company (Exh. 18, R. 84) are not "international ferries" and are therefore not entitled to the exemption.

Note the absurdity in which this construction results: For the fiscal year ending June 30, 1932, a part of the period in controversy, the following applicants were admitted at the Port of Seattle from the steamship companies named below:

Canadian Pacific Railway Company (appellant) vessels from Victoria and Vancouver	71,540
Puget Sound Navigation Company vessels	7,119
All other vessels	147
	78,808

(R. 75).

Inasmuch as the only vessels of the appellant arriving in Seattle during the period at issue were the two arrivals at 9:00 P. M. and 7:45 A. M., and inasmuch as the Puget Sound Navigation Company has only one vessel arriving from Victoria, at about 6:00 P. M. (Exh. 4, R. 78), *all of the above applicants arrived during overtime hours except for arrivals on three excursion trips* (for which appellant paid (Exh. B, R. 66), *and except for* 149 *arrivals on all carriers other than the Puget Sound Navigation Company and the appellant.*

Thus 90% of the entire work of the Immigration Service at the Port of Seattle for the fiscal year ending June 30, 1932, was rendered to the vessels of the appellant. Of these vessels all but three on excursion trips arrived after 5:00 P. M. and before 8:00 A. M. If the judgment below is sustained, the appellant, a foreign steamship company, will be compelled to pay at the high rate of overtime pay for approximately 90% of the immigration inspection work done at the Port of Seattle.

Thus the exercise of an important prerogative of government, that of supervising and controlling the entry into the country of all persons seeking admission, would be subsidized at the Port of Seattle by two corporations, the appellant Canadian Pacific Railway Company, and the Puget Sound Navigation Company which would have to pay for approximately 9% of such work. The Government apparently would pay for only 1% of the work done, based upon the figures for the fiscal year ending June 30, 1932.

Note, too, how oppressive and unreasonable the result

is when the amount of overtime charge is compared to the passenger revenues received by the appellant from January, 1932, to the end of June, a period of six months:

Passengers carried to Seattle	19,659
Gross revenues from passenger tickets	$46,465.55
Overtime charge	$2,127.53
Percentage of overtime charges to gross revenue	4½%

(Exh. 17, R. 84).

If the percentage were figured on net instead of gross income, the charge would amount to a substantial income tax.

Is it reasonable to suppose that Congress intended to impose such a burden on two carriers only along the Canadian-American border line, when competing carriers serving the same territory and the same traffic, rendering the same or similar service, to-wit, the railroads, auto stages and airplanes traveling to and from Vancouver and Seattle or Victoria and Seattle, are exempt from such charges?

It is submitted that the construction placed upon the proviso by the District Court squarely opposes the intention of Congress and the evident purpose of the overtime act, violates established rules of statutory construction and results in absurd and inequitable consequences.

3. Meaning of the words "International Ferry."

For all of the foregoing reasons the appellant's vessels come clearly within the spirit and purpose of the act

exempting regular scheduled service from payment of overtime charges, but can they be brought within the letter of the law?

As has been pointed out above, the words *international ferry* are new in the law and undefined, but voluminous authorities have defined the word *ferry*. Without referring to any of the latter, the District Court laid down three requirements for a "ferry" (R. 95, 101):

> 1. FRANCHISE: There must be a franchise or license to operate.
>
> 2. CHARACTER OF SERVICE: The ferry must offer a "service of necessity" for common good, in continuation of a highway across rivers or bodies of water.
>
> 3. CONSTRUCTION: The ferry boat must be especially constructed with open ends to admit vehicular traffic.

THE FRANCHISE

In respect to the first point, the District Court is entirely correct. The franchise is the most essential element in the definition of "ferry." It is said in many decisions that *a ferry is a franchise.* At common law a ferry could not operate without a franchise from the king. (1).

See: "Original and Monopoly Rights of Ancient Ferries," 63 U. of Penn. L. R. 718-53.

(1) The modern definition in England, as given in "The Laws of England" by the Earl of Halsbury, Vol. 14, page 555, is restricted as follows: "A public ferry is a public highway of a special description whose termini must be in places where the public have rights, such as towns or vills, or highways leading to towns or vills. In the one case, the grantee of the ferry has the exclusive right to carry passengers, animals, or goods over a river or arm of the sea from town to town; in the other he has a similar right to carry from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. * * * A ferry is created by Royal grant, or in modern days by Act of Parliament, or exists by prescription, which implies a Royal Grant" (page 557). See also Meir's Digest of English Case Law, Vol. 9, page 858, and The English v. Empire Digest, Vol. 24, page 968.

In this country the grant of a franchise by the state or municipality has always been the foundation of ferry rights. As stated in *Fort Richmond and B. P. Ferry Co. v. Board of Freeholders* (1914), 234 U. S. 317, 58 L. ed. 1330, at page 321:

> "At common law, the right to maintain a public ferry lies in franchise; in England such a ferry could not be set up without the King's license; and in this country the right has been made the subject of legislative grant."

The element of exclusive franchise is fundamental in all definitions of a ferry.

As stated in *Mills v. St. Clair Co.*, 7 Ill. 197:

> "The grant of a ferry franchise by the sovereign is of very ancient origin, and it has always been the rule that the privilege was exclusive. No one is permitted to run another ferry within a prescribed or reasonable distance from the ferry established by franchise, and one so doing in injury to the business of the franchised ferry will be enjoined."

It is virtually impossible to define a "ferry" without reference to a franchise or license to operate. To attempt to do so is like defining a railroad without reference to the railroad track. The track in the one case and the franchise in the other is the foundation of the definition.

See 59 L. R. A. 513-56; L. R. A. 1916-D 832, for exhaustive annotations regarding ferries.

In bringing innumerable definitions of the word "ferry" to aid in determining what is an "international ferry," we are therefore completely at loss, inasmuch as

there can be no franchise for a ferry operating from one of the United States to Canada. As stated by the Supreme Court, in holding that a franchise could not be granted by the State of Michigan for operating a ferry to and from Canada at Sault Ste. Marie:

> "Has the State of Michigan the right to make this commercial intercourse a matter of local privilege to demand that it shall not be carried on without its permission, and to exact as the price of its consent —if it chooses to give it—the payment of a license fee? This question must be answered in the negative." (*Sault Ste. Marie v. International Transit Co.* (1914), 234 U. S. 333, 58 L. ed. 1337.

The act at issue here was passed after the foregoing decision had established the law for 17 years on the subject of ferries operating between Canada and the United States. In view of this decision, Congress could not have intended to embrace in the words "international ferries" the ancient and accepted definition of a "ferry" as a franchise right. What, then, is left in the definition of the word "ferry" which could sustain the conclusions of the District Court or assist in determining the meaning of the words "international ferry."

CHARACTER OF SERVICE RENDERED; TYPE OF VESSEL

The word "ferry" has not been narrowly defined in this country as in England, possibly due to the presence of larger bodies of water than were common in England. Thus, in Washburn on Real Property (5th Ed., Vol. 2, p. 305), ferries are defined as:

> "The right of carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another, for a compensation paid by way of a toll."

As stated in the frequently cited leading case of *Mayor of the City of New York v. Starin* (1887, Ct. of App. N. Y.), 106 N. Y. 11, 12 N. E. 631, at page 632:

> "A ferry is a continuation of the highway from one side of the water over which it passes to the other and is for the transportation of passengers or of travelers with their teams and vehicles, and such other property as they may carry or have with them."
>
> *Broadnax v. Baker* (1886), 94 N. C. 675, 55 Am. Rep. 633, cited with approval in *County of St. Clair v. Interstate Sand & Car Transfer Company* (1903), 192 U. S. 453, 48 L. ed. 519 at 524.

It was further stated on page 632 in the Starin case that:

> "In a strictly ferry business, property is always transported only with the owner or custodian thereof; the ferry-men who do nothing but a ferry business, and have nothing but a ferry franchise, are bound to transport no other property; and, in the transportation of persons with their property, they are not under the obligations of a common carrier, but are bound only to due care and diligence. *Wyckoff v. Queens Co. Ferry Co.*, 52 N. Y. 32. But they may combine, and usually do combine, with the ferry business the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian, like other carriers engaged in the transportation of such freight; and as to such freight, they are under the duties and obligations of a common carrier. As ferry-men they are under a public duty to transport, with suitable care and diligence, all persons with or without their vehicles and other property; and as common carriers it is

their duty to carry all freight and merchandise delivered to them."

Bouvier's Law Dictionary defines a ferry as:

> "A liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents for a reasonable toll. * * * Ferries properly mean the place of transit across a river or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river or arm of the sea from one vill to another, or to connect a continuous line of road leading from one township or vill to another."
>
> *Alexandria Warsaw & Keokuk Ferry Co. v. Wisch*, (1881), 39 Am. Rep. 535, 73 Mo. 655.

As was stated in *Broadnax v. Baker* (1886), 94 N. C. 675, 55 Am. Rep. 633:

> "A ferry is defined by Mr. Webster, in words borrowed from legal authorities, to be 'a liberty to have a boat for passage upon a river, for the carriage of horses and men for a reasonable toll,' adding 'it is usually to cross a large river.' Tomlin Law Dict.
>
> "*It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water*, the essential idea of passing from one shore to an opposite shore being retained."

The broader definition of the American Courts is also reflected in the statutory definition of the California Political Code, Section 3643, in which a ferry is defined as:

> "A vessel traversing across any of the waters of the State between two constant points regularly employed for transfer of passengers and freight, authorized by law to do so * * * ."

It is clear that a ferry may operate between three points as well as two.

Mayor of the City of New York v. New Jersey Steamboat Transportation Company (1887, Court of Appeals of New York), 106 N. Y. 28, 12 N. E. 435.

In none of the definitions of "ferry" just stated is there any limitation upon the size of the body of water crossed, so long as it be inland, lake, bay or arm of the sea. By the very nature of the service required of a ferry there could be no arbitrary limitation. The *raison d'etre* of a ferry arises from the geography of the country. A glance at Exh. 8, R. 80, shows the Puget Sound region to be severed and broken up by an inlet of the sea completely embraced by land. There is a network of communication by ferries back and forth across the sound, and among the San Juan Islands, and between the mainland and Vancouver Island.

The District Court recognized that these services of the Puget Sound Navigation Company constitute international passenger ferry service (Exh. 13, R. 82, Exh. 18, R. 84, 96, 97), and that the appellant's vessels between Nanaimo and Vancouver Island were ferry vessels, but held that appellant's vessels from Victoria to Seattle were not ferries. The Puget Sound Navigation Company vessel operating from Port Angeles to Sidney, B. C., is held to be a "ferry" (R. 96, 97), but the same vessel operates between Seattle and Victoria. Does it cease to be a "ferry" on the latter run merely because the distance is greater, and if so at what point on the course does the metamorphosis take place?

It is also said that the runs between Seattle and Victoria are merely "scenic" passenger trips (R. 99). Every ferry on Puget Sound offers a scenic passenger trip, particularly

the Puget Sound Navigation Company trips through the San Juan Islands to Sidney, B. C., which the District Court admitted were ferry services. There is no substance in the court's objection that the trip is a scenic one.

Lastly, the District Court's requirement that vessels be "specially constructed" (R. 99) with open ends (R. 96) is not sustained by any authority whatsoever. In none of the decisions or annotations referred to above is there any suggestion as to the style of construction of a ferry vessel. *The character of the service rendered and not the design of the vessel is the determining feature.* Whether the vessel opens at the end or on its side is entirely immaterial, so long as passengers, their baggage and vehicles are transported from one point to another across a body of water.

Nor is it suggested in any of the foregoing decisions that the ferry is "a way of necessity," although this phrase appears in some of the very early decisions dealing with ferries across rivers or streams. The phrase is clearly obsolete; otherwise the presence of numerous bridges across the Hudson river in New York City would divest all of the ferries of their status as ferries because they were no longer "ways of necessity" across the water.

CONCLUSION

It is respectfully submitted that the operations of the appellant came within both the letter and spirit of the exempting proviso of Sec. 109 b, Title 8, U. S. C. and being thus exempt from immigration overtime payments the judgment appealed from should be reversed.

Respectfully submitted,

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APPENDIX "A"

§109a, Title 8, U. S. C. Officers and employees; overtime services; extra compensation; length of working day. The Secretary of Labor shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Secretary of Labor is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed. (Mar. 2, 1931, c. 368, §1, 46 Stat. 1467).

§109b. Same; extra compensation; payment. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other con-

veyance arriving in the United States from a foreign port to the Secretary of Labor, who shall pay the same to the several immigration officers and employees entitled thereto as provided in section 109a of this title. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual inspection or examination of passengers or crew takes place or not: *Provided*, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules. (Mar. 2, 1931, c. 368, §2, 46 Stat. 1467).

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 7366

CANADIAN PACIFIC RAILWAY COMPANY,
a foreign corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the District Court of the United States
For the Western District of Washington,
Northern Division.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

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BRIEF PRINTING COMPANY

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The original action was instituted in the District Court of the United States for the Western District of Washington, Northern Division, for the purpose

of enforcing the payment by the present appellant corporation of the sum of four thousand, three hundred and thirty-one dollars and thirteen cents ($4331.13) for "overtime" services rendered by inspectors and employees of the United States Immigration Service in connection with the examination and landing of passengers and crews of the said corporation's steamships, from May 3, 1931, to September 30, 1932, inclusive. Prior to the trial, the sum of $86.33 was paid by the said corporation for such "overtime" services as had been performed by said inspectors and employees in connection with the inspection of certain of its steamships which were not running on regular schedules. No question was raised as to the accuracy of the account (pp. 5-57, Transcript), but the said corporation disclaimed liability for any other part of same on the ground that the other steamships involved were operated on regular schedules and were carrying passengers and automobiles as international ferries, and that, for that reason, it and the said steamships were exempt from such "overtime" charges. The District Court held that the steamers in question were not "international ferries" and rendered judgment in favor of the plaintiff for $4244.80, the full amount claimed. The case now comes before this court on appeal from the said judgment.

ARGUMENT

Action was brought under the Act approved March 2, 1931 (c.368, secs. 1 and 2, 46 Stat. 1467; 8 USCA, Secs. 109a and 109b), entitled: "An act To provide extra compensation for overtime service performed by immigrant inspectors and other employees of the Immigration Service", which reads as follows:

> "The Secretary of Labor shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Secretary of Labor is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours

in said ports, but nothing contained in this Section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed."

Sec. 2. "The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving in the United States from a foreign port to the Secretary of Labor, who shall pay the same to the several immigration officers and employees entitled thereto as provided in this Act. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual inspection or examination of passengers or crew takes place or not: *Provided*, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules."

Department of Labor General Order No. 175, issued April 27, 1931, under authority of the foregoing Act (Defendant's Exhibit 12) provides as follows:

"(a) Overtime shall be understood to mean time on duty in addition to the number of hours fixed administratively as the regular work day of inspectors and employees. To constitute overtime for the purpose of the foregoing Act there must exist two factors, to wit, (1) time on duty

in addition to the number of hours fixed administratively as the regular work day of inspectors and employees, and (2) time on duty for at least one hour between 5 p.m. and 8 a.m. on any day."

"(b) No distinction is to be made between week days, Sundays and holidays so far as employment between the hours of 5 p.m. and 8 a.m. is concerned."

* * * *

"(d) For duties performed on Sundays and holidays between the hours of 8 a.m. and 5 p.m. employees shall be entitled to two days' pay in excess of their regular pay. The term "holiday" shall include only national holidays, viz.: January 1, February 22, May 30, July 4, the first Monday in September, Thanksgiving Day (when designated by the President), December 25, and such other days as may be made national holidays by Act of Congress."

"(e) For each two hours or fraction thereof of at least one hour that such duties are performed in excess of the regular shift of duty between 5 p.m. of any day and 8 a.m. of the following day, employees shall be entitled to one half day's pay in excess of his regular pay. Where in any unit of time beginning at 5 p.m. and ending at the following 8 a.m. such duties are performed in broken periods and less than two hours intervene between such periods they shall be combined, otherwise each period of such unit shall be considered separately. The maximum amount which shall be paid to any em-

ployee for the purpose of such duties between 5 p.m. and the following 8 a.m. shall not exceed two and one-half days' pay in excess of the regular pay. After that amount is earned no further compensation can be paid for any services up to 8 a.m. of the same inspector or employee."

"(f) This order shall likewise apply to the time on duty after reporting for duty pursuant to order to do so and regardless of whether or not actual inspection or examination of passengers or crews takes place in those cases in which the government is not liable for the overtime."

"(g) For the purpose of this order, a day's pay in the case of inspectors or employees receiving compensation per annum shall be one three hundred and sixtieth of the regular annual salary, and in the case of inspectors and employees receiving compensation per month shall be one-thirtieth of the regular monthly salary."

* * * *

"(i) The customary working hours of inspectors and employees engaged in the examination and landing of passengers and crews shall be, as far as practicable, within the time between 8 a.m. and 5 p.m."

"(j) Liability for payment of overtime compensation shall not apply to the examination and inspection of passengers at designated ports of entry arriving on or by international ferries, bridges, tunnels, aircraft, railroad trains or ves-

sels on the Great Lakes and connecting waterways, when operating on regular schedules filed with the immigration officer in charge at such designated port of entry. Examination and inspection at such designated ports of entry shall mean such examination and inspection actually performed at the record port of entry. Overtime compensation for which the government is not liable shall be prorated among the various vessels and conveyances according to the aggregate of the total overtime of each inspector and employee in connection with the examination and inspection between 8 a.m. and 5 p.m. on Sundays and holidays, of the crew of each vessel or conveyance concerned, and also of the passengers on such vessel or conveyance, unless under this paragraph there is no liability with respect to inspection and examination of passengers. Such liability for overtime on all days between 5 p.m. and 8 a.m. is to be prorated in the same manner."

"(k) Payment on the part of vessels or other conveyances of overtime compensation shall be made by postal money order or certified check (including any charge for collection or exchange) payable to the Disbursing Clerk, Department of Labor, and forwarded to the Commissioner General of Immigration. Payment by the Disbursing Officer of the Department to the inspector or employee concerned of extra compensation for which the master, owner, agent, or consignee is liable can be made to the extent only that collection is made from such master, owner, agent, or consignee and received by the Disbursing Clerk, Department of Labor."

* * * *

"(n) Commissioners and District Directors of Immigration will arrange schedules and working hours of inspectors and employees of the Immigration Service so as to avoid overtime within this order, as far as possible consistent with the enforcement of the immigration laws and the convenience of persons arriving in the United States, and also as far as practicable cause any overtime work within the terms of this order to be equally alternated among the inspectors and employees engaged at the same port in the inspection and examination of arriving passengers and crews."

The provisions of the foregoing statute and General Order are practically identical with the laws providing for and governing "overtime" pay for officers of the U. S. Customs Service (Act of February 13, 1911, sec. 5, 36 Stat. 901, as amended by the Act of February 7, 1920, 41 Stat. 402, Comp. Stat. Ann. Supp. 1923, sec. 5571, and Tariff Act of September 21, 1922, 42 Stat. 858). The only difference material to this cause is that the requirement of payment for overtime services to immigration inspectors and other employees does not apply to inspection and examination at designated ports of entry of passengers arriving at such ports via international ferries.

The requirement of payment to officers of the

Customs Service for overtime work has been upheld by the courts on various occasions, notably:

Port Huron & Sarnia Ferry Co. v. Lawson, (D. C. Mich. August 6, 1923), 292 F. 216;

Mellon v. Minneapolis, St. P. & S. S. M. Ry. Co. (Court of Appeals District of Columbia, Feb. 1, 1926), 11 F. (2d) 332.

Ferguson v. Port Huron & Sarnia Ferry Co. (D. C. Mich. June 4, 1926), 13 F (2d) 489.

For many years, the appellant corporation has been paying for overtime work by the officers of the said Service at the port of Seattle and, during the period involved in the present case, it was paying for such work performed by the said officers in connection with the arrival of the same steamers for the inspection, examination and landing of the passengers and crews of which it refused to pay the officers of the Immigration Service.

It was the duty of the immigration officers to examine and inspect the passengers and crews of the steamers in question upon their arrival at the port of Seattle (Section 15, Act of February 5, 1917, 8 USCA, Sec. 151), and that, regardless of the fact that there may have been pre-examination

of said passengers in Canada prior to their embarkation for said port (General Order No. 133, Department of Labor, May 4, 1929). It also was proper that the passengers and crews of the said steamers should be examined by two immigrant inspectors (Section 16, Act of February 5, 1917, 8 USCA, Sec 152).

In view of the foregoing, the only point at issue is whether or not, in holding that the appellant corporation was not operating the steamers in question as "*ferry-boats*" *of an* "*international ferry*", the District Court misconstrued the law.

Webster's New International Dictionary (1923 edition) defines a "ferry" as: (1) "A place of crossing"; (2) "A place or passage where persons or things are carried across a river, arm of the sea, etc. in a boat"; (3) "A vessel in which passengers and goods are conveyed over narrow waters"; (4) "A franchise or right to carry passengers or goods, or both, from shore to shore across a river, channel or narrow body of water, charging tolls"; also as: "A continuation of the highway and under the same general control". It also defines a "ferry-boat" as: "A vessel for conveying passengers, merchandise, etc. across a river or other narrow water."

Other definitions of, and requirements for the establishment and maintenance of, ferries are as follows:

> "A ferry is the right of carrying passengers across streams or bodies of water or arms of the sea from one point to another for a compensation by way of a toll. *New York v. Starin*, 8 N.Y. St. Rep. 655, 659."

> "Bouvier defines a ferry to be a place where persons and things are taken across a river or stream in boats or other vessels for hire."

> "A ferry, in a general sense, is a highway over narrow waters, and is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers, with their teams and vehicles, and such other property as they may carry or have with them."

> "A ferry, says Dane (Vol. 2, p. 683) forms a part of a public passage or highway where rivers or waters are to be passed in boats."

> *Words and Phrases*, Vol. 3, p. 2749.

> "The essential element in a ferry is the transportation over intervening water—a crossing from shore to shore at points conveniently opposite, and forming connection with thoroughfares at each terminus. A ferry is defined by Mr. Webster, in words borrowed from legal authorities, to be 'a liberty to have a boat for passage

upon a river for the carriage of horses and men for a reasonable toll', adding, 'It is usually to cross a large river.' It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water; the essential idea of passing *from one shore to an opposite shore* being retained." (Italics ours).

Words and Phrases, Vol. 3, pp. 2749, 2750.

"A ferry is a franchise granted by the State and regulated by statute. It may be defined as a right to transport persons and property across a water course and land within the jurisdiction granting the franchise, and to receive tolls or pay therefor." *Einstman v. Black*, 14 Ill. App. 381, 383, 384; *Words and Phrases*, Vol 3, p. 2750.

"* * * A ferry franchise is property and an incorporeal hereditament."

Words and Phrases, Vol 3, p. 2751.

"Ferries — that is, rights of carrying passengers across streams or bodies of water or arms of the sea, from one point to another for a compensation paid by way of a toll — are by common law deemed to be franchises, and cannot, in England, be set up without the King's license, and in this country without a grant of the legislature, as representing the sovereign power." *City of New York v. Starin*, 12 N. E. 631, 632; 106 N. Y. 1; *Words and Phrases*, Vol. 3, p. 2751.

A ferry necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. *Port Richmond Ferry Co. v. Freeholders of Hudson County*, 234 U. S. 317.

"A ferry license is a privilege of highway, and the right to grant such a franchise belongs to the State. It may be granted or withheld, and the right to prohibit undoubtedly carries with it the right to impose conditions." *State v. Sickmann*, 65 Mo. App. 499, 501; *Words and Phrases*, Vol. 3, p. 2751.

"The essential element in a ferry franchise is the exclusive right to transport persons and horses, and vehicles with which they travel, as well as such personal goods as accompany them, from one shore to the other, over the intervening water, for the toll." *Broadnax v. Baker*, 94 N. C. 675, 681, 55 Am. Rep. 633; *Words and Phrases*, Vol. 3, p. 2752.

"The grant of a ferry franchise necessarily implies a right to exercise exclusive privileges within prescribed limits, and on certain conditions."

Words and Phrases, Vol. 3, p. 2752.

"A ferry is a liberty to have a boat upon a stream, river, arm of the sea, lake, or other body of water, for the transportation of men, horses, and vehicles with their contents, for a reasonable toll. The term is also used to designate the place where the right is exercised, and

sometimes as limited to the landing place. Ferries are frequently referred to or regarded as public highways, being continuations of the highways with which they connect, and serving the purpose of a bridge where a bridge is impracticable. But the terms 'ferry' and 'bridge' are not ordinarily capable of use as synonymous terms, and it has been denied that ferries are highways in a strict sense. There are some authorities holding it to be essential that a public ferry must be in continuation of a public highway. The limits of the ferry proper are the high water mark at either terminus. There is nothing in the nature of a ferry which requires that it should be operated from but one place on one shore to a single point on the opposite shore; nor is there any particular limit to the distance over which it may be operated, *provided only the intervening waters are not wide and can be traversed at regular and brief intervals by boats adapted to a ferry business* * * *"

"Private and public ferries distinguished—

"A distinction is made between private ferries, which riparian owners may under certain restrictions establish for their own convenience, and public ferries which are franchises that cannot be exercised without the consent of the State and must be based upon grant, license, or prescription." (Italics ours) 25 *C. J.* 1048-1050.

The term "ferry" does not apply to a line of steamboats from Albany to New York. "To speak of a ferry from New York to Albany is as great an abuse of terms as to talk of a ferry from New

Orleans to St. Louis or Pittsburg, and even from New York to Liverpool." *North River Steamboat Co. v. Livingston,* 3 Cow. (N. Y.), 713, 748; 3 Wheel. Cr. 483; 25 *C. J.* 1050.

"The right to establish and maintain a public ferry is a franchise which cannot be exercised without consent of the State, and no person, although he may own the land on both sides of a stream, may establish such a ferry unless authorized to do so by the proper public authority." 25 *C. J.* 1051.

"In the United States the power of granting ferry franchises is vested in the legislative authority of the States. It never has been exercised by the federal government." 25 *C. J.* 1052.

"This power has, in many States, been delegated to certain inferior bodies by general acts of the legislatures." 25 *C. J.* 1053.

"The States * * * have authority to establish ferries upon waters forming a boundry * * * between a state and a foreign country." 25 *C. J.* 1055.

"The State may, through the proper authorities, require the payment of a license fee from ferries operating within its jurisdiction * * * and fix the rates of ferriage * * *." 25 *C. J.* 1073.

The steamers for the examination and inspection

of the passengers and crews of which the "overtime" pay is sought by the immigration officers, are the "Princess Kathleen", "Princess Marguerite", "Princess Louise", "Princess Charlotte", and "Princess Adelaide". Their descriptions, according to the appellant corporation's advertising folders, are as follows:

	Gross Tonnage	Passenger Capacity	No. of Beds	No. of State-rooms	Dining-room Capacity
Princess Kathleen	5875	1500	290	136	166
Princess Marguerite	5875	1500	290	136	166
Princess Louise	4200	1200	262	132	129
Princess Charlotte	3924	1200	230	118	118
Princess Adelaide	3060	1200	206	103	84

All of the above are constructed on the general lines of regular deep-sea steamships and bear no resemblance whatever to the ordinary type of "ferry-boat". All are equipped with wireless apparatus and carry wireless operators, and it is understood that all except the "Princess Louise" were built in Scotland and crossed the Atlantic ocean under their own power, and also came up the Pacific ocean to Vancouver, B. C. before being placed on the route between that city and Seattle. It also is well known that, when not running between said ports, they frequently have run on other routes of the appellant

corporation, and that some of them, if not all, have made trips to Alaska on various occasions. As shown above, all have spacious dining-rooms and sleeping accomodations for hundreds of passengers. They are referred to in the appellant corporation's advertising matter as "*Princess Liners*", and are classified by the United States Steamboat Inspection Service as "*Foreign Passenger Steamers*" (Plaintiff's Exhibit G). Those which arrive at Seattle in the evening leave Vancouver, B. C. in the forenoon, go from there to Victoria, B. C., a distance of 85 *miles*, remain in Victoria from one to one and one half hours, and then proceed to Seattle, a distance of 81 *miles*, arriving at the said port at 9 p.m. or thereabouts. Those arriving at Seattle, at, or about, 7:30 a.m., as a general rule, go direct from Vancouver, a distance of approximately 145 *miles*. They leave Vancouver at, or about, 11 p.m. The distance from Vancouver direct to Seattle is almost exactly the same as that from New York to Albany, the absurdity of speaking of a "ferry" between which cities was stated by the Court in *North River Steamboat Co. v. Livingston, supra.* The passenger fares from Vancouver and Victoria to Seattle are $4.25 and $2.50, respectively, exclusive of meals and berth, and the rates charged for automobiles are shown by appel-

lant's advertising folders to be from $6.00 to $8.00 from Vancouver, and from $4.00 to $6.00 from Victoria. The testimony at the trial shows that baggage checks for their automobiles are given to passengers having same with them. In addition to passengers and automobiles, these steamers carry mail and some freight between Vancouver and Victoria and Vancouver and Victoria and Seattle. The main part of their business, however, is carrying passengers. The proportion of automobiles carried is one to thirty or forty passengers (p. 4, Brief).

Vancouver is approximately 35 miles *north of the international boundary* between Canada and the United States, and Seattle is about 120 miles *south of* the said boundary. The route followed by the steamers in question does not cross any river or stream forming any part of the said international boundary, but is through the Gulf of Georgia, Straights of Juan De Fuca, Puget Sound, and waters classified by the United States Department of Commerce Pilot Rules as a portion of the high seas.

On page 3 of their Brief counsel attempt to liken the operations of appellant's vessels in question to the services between the mainland and San Juan Island points, between Port Angeles, Washington,

and Victoria, B. C., and between Anacortes, Washington, and Bellingham, Washington, and Sidney, B. C., maintained by the Puget Sound Navigation Company, a Washington corporation. There is no reasonable comparison whatever. The distances traversed by the latter vessels between Port Angeles and Victoria and Bellingham and Sidney are only a fraction of the distances traversed by the appellant's steamers, and the said points are conveniently opposite each other on the shores of the United States and Canada. The said vessels also perform a practically necessary service. The fact, however, that the District Court conceded said routes to be "ferry-lines", in its finding of facts, is not conclusive that they are such *as a matter of law*, as their status as such was not an issue at the trial of this cause, and the court's statement is consequently only *dictum*. The service maintained by appellant's vessels compares much more favorably with that afforded by those plying between Yarmouth and Halifax, N. S., St. Johns, N. B., and Boston and New York, except that the latter are somewhat larger, cover a longer distance, and arrive more infrequently outside of the summer tourist season. These vessels are subject to "overtime" charges whenever they arrive at Boston or New York between 5 p.m. and 8 a.m. (pp. 75, 76, Transcript).

Counsel criticize (pp. 5, 6) the District Court's holding that appellant's steamers in question are not "ferries" on the ground that appellant has no franchise, or license, to operate a ferry within the boundaries of the State of Washington, and cite *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, as authority for such criticism, claiming (p. 6) that, in said case, the Supreme Court held that a state has no power to issue a franchise for international ferries. They also state (pp. 24, 25), after having previously conceded (pp. 23, 24) *that a franchise, or license to operate, is the most essential element in constituting a "ferry"*, that they are entirely at a loss in determining what is an international ferry, inasmuch as there can be no franchise for a ferry operating from one of the United States to Canada, and cite the same case as authority, claiming that it held to that effect. The Court made no such ruling. The decision shows that the International Transit Co. was a foreign corporation having its domicile in Canada, and was engaged in commerce between Canada and the United States; also that *it had a license*, or franchise, from the Canadian Government to operate a ferry between Sault Ste. Marie, Ont. and Sault Ste. Marie, Mich., which prescribed the frequency of the service, the rates to be charged, etc. and provided that

the said company should not infringe on any laws, by-laws or regulations of the United States, the State of Michigan, or the town of Sault Ste. Marie, applicable to said ferry. The sole question before the Court was whether or not, under these circumstances, and under a local ordinance, the said transit company could be compelled to take out a municipal license and pay a license fee to the city of Sault Ste. Marie, Mich. for the privilege of continuing to operate said ferry. The Court held that it could not, and that such matters were within the scope of National, rather than State, legislation. The Court said (p. 342):

> "Assuming that * * * *there exists in the absence of Federal action a local protective power to prevent extortion in the rates charged for ferriage from the shores of the States, and to prescribe reasonable regulations necessary to secure good order and convenience,* we think that the action of the city in the present case in requiring the appellant to take out a license and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the State could exercise either directly or by delegation." (Italics ours).

In *Port Richmond Ferry Co. v. Freeholders of Hudson County*, 234 U. S. 317, also cited by appellant, the Supreme Court said (pp. 321, 328, 332):

> "At common law the right to maintain a public ferry lies in franchise. * * * the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety and convenience of the public. * * * In the absence of action by Congress re interstate ferries, the states have power to regulate. One state, however, cannot derogate from the powers of another state. * * *"

The power of a State extends to regulation of ferries in and into the State, if interstate or foreign commerce is not directly burdened: *St. Claire Co. v. I. S. & C. T. Co.*, 192 U. S. 454. Regulation of operation of international ferries within the State is feasible without violation of international custom or law: *United States v. DeWitt*, 76 U. S. 41 (9 Wall.); nor is the United States concerned with the reasonable regulation of wharves, piers, docks, etc.: *Cannon v. New Orleans*, 87 U. S. 577 (20 Wall.), or establishment of ferries: *Conway v. Taylor's Executors*, 1 Black, 603.

The appellant has no ferry license, or franchise, as required by the laws of the State of Washington (Remington's Revised Statutes of Washington, Vol. 6, Title 32, secs. 5462-5483) and has produced no evidence to show that it has, or ever had, any license

or franchise from the Canadian Government to operate a ferry between Vancouver or Victoria, B.C. and Seattle. The route traversed by appellant's steamers is entirely at variance with the popular conception of a "ferry", and with the definitions of that term above cited. As heretofore stated, its steamers bear no resemblance whatever to the conventional type of "ferry-boat", and they are performing a competitive, rather than a necessary service. They also are required to "enter" and "clear" on each trip which they make to Seattle (See testimony of Oscar W. Damm, Deputy Collector of Customs at Seattle, p. 77, Tr.), while "ferry-boats" are not required to pay clearance fees (R. S. 2792).

Counsel state (p. 4 of their Brief) that the "overtime" law in question was designed to meet the rising demand for overtime immigration inspection service for trans-Atlantic carriers arriving at ports of entry at unanticipated hours, and that the proviso which they cite on page 2 was added to the Act to exempt from its provisions the carriers named when operating on regular schedules over the Canadian border, and (p. 25) contend that Congress could not have intended to embrace in the words "international ferries" the ancient and accepted definition of a "ferry" as a franchise right.

The original design of the bill may be correctly stated, inasmuch as Congressional Record No. 10909, June 16, 1930, shows that same, as it first passed the House of Representatives, contained the following:

> "*Provided*, however, that the provisions of this Act relating to extra compensation shall not apply to international bridges, or to ferries and railroad trains operating on regular schedules."

The report of the Senate Committee on Immigration (No. 1720), which forms a part of "Defendant's Exhibit No. 11", contains the following:

> "The bill as amended in the House limited the application of overtime to ocean ports of entry. Your committee is of the opinion that certain conditions at the international borders are equally meritorious, and has therefore provided that overtime *shall apply to the international boundary as well as to ocean ports, except under the following conditions*:
>
> 'Overtime shall not apply to international ferries, bridges or tunnels.
>
> 'Nor shall aircraft, railroad trains, or *vessels on the Great Lakes and connecting waterways* be subject to assessments for overtime duties performed by immigration employees when they are operating on their regular schedules.
>
> * * * *

'One of the best reasons for favoring this legislation is that for many years the customs employees have had a similar overtime provision to that proposed in this bill, while the immigration officers working side by side with them in the performance of their duties have been, so far, discriminated against.

* * * *

'It is the opinion of the committee that the bill is justified by the principle that the transportation companies should reimburse the Government for special services at unusual hours that advance their own interests. * * * ' " (Italics ours).

The House of Representatives concurred in the Senate amendments and the law was passed in its present form, *supra.* From the foregoing we must conclude that it was designed to apply to the Canadian border and also to place the immigration inspectors and other employees on at least a partial parity with the officers of the Customs Service.

Counsel devote several pages of their Brief to citations of, and quotations from, decisions of the Supreme and other courts respecting the construction of laws, and argue that, under the said decisions, the appellant's vessels are included in those exempted from the operation of this law.

While it is a general rule of law that statutes be strictly construed, it unquestionably is also good law that, when the language of a statute is ambiguous or uncertain, it is open to construction as to its actual meaning and intent. There is nothing ambiguous or uncertain here, however. The classes of carriers exempted from overtime charges are clearly stated. Had Congress had any conception that vessels on the Great Lakes and connecting waterways fell within the category of "international ferries", what was the object of making a specific exception of such vessels under a special classification when provision already had been made for such ferries? The fact that it did so shows conclusively that it had no such conception. How, then, can it be assumed that there was any intention on the part of Congress to exempt the vessels of this appellant, which traverse a much greater distance than most of same, start from a point in Canada approximately 35 miles north of the international boundary, and do not land in the United States until they are more than 100 miles south of said boundary, in the absence of any mention whatever of them in the law? If Congress had any such intention, why did it not say so, as in the case of the Great Lakes steamers? We see nothing in any of

the decisions cited to support appellant's argument.

On pages 20 and 22 of their Brief, counsel submit statements as to the number of passengers carried from Vancouver and Victoria to Seattle during the fiscal year ending June 30, 1932, and the number of passengers carried to Seattle in the first six months of 1932, the amount of revenue derived from such passengers' tickets, and the percentage of "overtime" charges to such revenue and, on page 21, make the statement that 90 per cent of the entire work of the Immigration Service at the port of Seattle for the fiscal year stated was performed in connection with the inspection of its vessels; also that, if the judgment of the District Court is sustained, appellant will be compelled to pay at the high rate of "overtime" pay, for approximately 90 per cent of the immigration inspection work done at the said port, thus apparently attempting to convey the impression that the inspection of its steamers constitutes practically all the work done by the immigration inspectors at that port, when, as a matter of fact, out of approximately twenty such inspectors, all inspection of appellant's steamers is performed by *only two* assigned to said work at any one time, the others being assigned to the inspection of many other arriving steamers and to various other

duties of inspectors. In this connection it may be stated that the account submitted does not appear to show any charges for the inspection of appellant's steamers which arrived at Seattle in the mornings (except a few made for inspection at Vancouver, B. C.), with the exception of those arriving on Sundays and holidays. Consequently, with the exception of such days, and such services at Vancouver, the only "overtime" services for which appellant was charged was the inspection at Seattle of its steamers which arrived about 9 p.m. We are unable to see that the number of passengers carried on appellant's steamers, the revenue derived therefrom, the percentage of same required to pay charges for inspection during overtime hours, or the proportion of appellant's passenger business to the total for the port of Seattle, has any material bearing on the legal aspects of this case.

The United States Government surely cannot be held responsible for the fact that the appellant's evening steamers were, and still are, scheduled to arrive at Seattle during the "overtime" period. The remedy for this situation appears to be in appellant's own hands. It can either bring such steamers into Seattle before the beginning of the said period or can discontinue this part of its service to Seattle, and

land its passengers at some other United States port which conveniently can be reached during the regular inspection period. Such action, no doubt, would be inconvenient, but would be quite possible, and would result in avoidance of the charges to which appellant objects.

On page 19 of their Brief, counsel quote from Department of Labor General Order No. 175, which directs (par. n.) that Commissioners and District Directors of Immigration arrange schedules and working hours of inspectors and other employees of the Immigration Service so as to avoid overtime within said Order, *as far as possible consistent with the due enforcement of the Immigration Law,* etc., and contend that, under said general order, arrangement should have been made for inspection of its steamers without overtime charges. No doubt such an arrangement would have been made by the Commissioner of Immigration at Seattle, pursuant to this order, had it been possible without affecting or altering the length of the regular working day of the inspectors concerned, which is expressly forbidden by section 109a, Title 8 USCA, *supra.* Consequently we must assume that, under the circumstances prevailing during the period involved (no doubt an insuffi-

cient number of inspectors) such arrangement *was not possible* without infraction of said section.

Even were it conceded that appellant's steamers in question constitute an "international ferry", it does not appear that appellant would be exempted from liability to pay overtime charges for the examination and inspection of the *crews* of same, as the exemption in the proviso contained in section 109b, 8 USCA, *supra*, extends only to *passengers*, and it would be physically impossible for the immigration inspectors to go from the Immigration Station to said steamers, make inspection of said crews required by law (see 8 USCA, secs. 151, 152, and Department of Labor General Order No. 133, supra), and get back to the Immigration Station inside of an hour.

It appears that the appellant corporation has been dealt with very leniently by the Immigration Service as to the amount of overtime pay claimed, as, according to the wording of the statute, it appears that such pay could have been claimed for the entire period from 5 p.m. until the inspection was completed, and it was so ruled in the case of the Customs officers in *Ferguson v. Port Huron & Sarnia Ferry Co., supra.*

CONCLUSION

The District Court did not commit error in awarding judgment to the plaintiff in the amount claimed, and said judgment should be *affirmed.*

Respectfully submitted,

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